SC98619

IN THE SUPREME COURT OF MISSOURI

ELAD JONATHAN GROSS,

Appellant,

v.

MICHAEL PARSON, *et al.*,

Respondents.

Appeal from the Circuit Court of Cole County, Missouri
Case No. 18AC-CC00422
The Honorable Patricia Joyce, Circuit Judge

BRIEF OF *AMICI CURIAE* *THE KANSAS CITY STAR* and *ST. LOUIS POST-DISPATCH*

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INTEREST OF *AMICI CURIAE*

Amici are the newspapers of record for the two largest cities in the State of Missouri. Reporters at these papers—literally every day—make Sunshine Law requests, review responses to those requests and, increasingly, engage in endless arguments over demands that reporters pay to have the government's attorneys review public records before the records will (or in some cases will not) be provided.

The *Post-Dispatch* saw this problem coming, and in 2013 it filed an amicus brief in the Court of Appeals in *White v. City of Ladue*; the *Post-Dispatch* asserted that public governmental bodies cannot charge for time attorneys spent reviewing records requested under the Sunshine Law. The court, however, refused to consider the issue, finding it had not been raised by the parties in their briefs.

And *The Star's* ongoing litigation with Clay County is the poster child of attorney review time abuse. When *The Star* requested copies of bills Clay County had received from the county's private, outside "Sunshine Law counsel," the county refused to provide the bills unless the paper first paid $4,200 for the outside attorney to review the bills (at the rate of $373.50 an hour). Then the outside attorney would decide what, if any, portions of the bills the reporter would be allowed to see.

Amici are thus uniquely positioned to provide this Court with insight into the growing abuse of charging for attorney review time and how to protect the public's right to meaningful access to public records under the Sunshine Law.

This amicus brief is filed with the consent of all parties.

ARGUMENT

THE SUNSHINE LAW DOES NOT ALLOW PUBLIC GOVERNMENTAL BODIES TO CHARGE FOR TIME ATTORNEYS SPEND REVIEWING PUBLIC RECORDS BECAUSE NO PROVISION IN THE SUNSHINE LAW AUTHORIZES SUCH CHARGES, AND THE TIME AN ATTORNEY SPENDS TO REVIEW AND REDACT RECORDS IS NOT "RESEARCH TIME" AND CONSTRUING THE SUNSHINE LAW TO ALLOW ATTORNEY TIME TO BE BILLED AS "RESEARCH TIME" WOULD LEAD TO UNREASONABLE RESULTS BECAUSE ONLY A LIMITED NUMBER OF GOVERNMENTAL BODIES HAVE "IN-HOUSE" ATTORNEYS AND THE SUNSHINE LAW ONLY ALLOWS "RESEARCH TIME" TO BE CHARGED BY "EMPLOYEES OF THE BODY."

I. The Missouri Sunshine Law

Just last year, this Court addressed the Missouri Sunshine Law in *Roland v. St. Louis City Board of Election Commissioners*, 590 S.W.3d 315 (Mo. banc 2019). In *Roland*, this Court determined that costs should not have been assessed against David Roland. Amici believe that holding controls the question of whether the Missouri Sunshine Law allows governmental bodies to charge requestors for attorney review time.

A. *Roland v. St. Louis City Board of Election Commissioners*

David Roland made a Sunshine Law request to the custodian of records for the St. Louis City Board of Election Commissioners. After the Board denied a portion of his request, Roland sued the Board, seeking a declaratory judgment that the requested records were open records under the Sunshine Law. Roland also alleged the Board knowingly or purposefully violated Sunshine Law by denying his request.

The circuit court agreed that the records were open and ordered the Board to produce them. The court, however, rejected Roland's claim that the Board had acted knowingly or purposefully in denying his request. The clerk then taxed the Board's costs to Roland because the Board had prevailed on Roland's claim that the Board acted knowingly or purposefully. Both parties appealed.

In its opinion, this Court affirmed the circuit court's ruling that the requested records were open records under the Sunshine Law. *Id*. at 321-22. However, this Court reversed the award of costs against Roland.

In explaining its ruling as to costs, the Court began by noting that "'[c]osts are a creature of statute, and courts have no inherent power to award costs, which can only be granted by virtue of express statutory authority.'" *Id*. at 322 (quoting *State ex rel. Merrell v. Carter*, 518 S.W.3d 798, 800 (Mo. banc 2017)). The Board cited Section 514.060 and argued it was entitled to costs because it was the prevailing party on Roland's claim that the Board had acted knowingly or purposefully. That statute states: "In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, *except in those cases in which a different provision is made by law*." *Roland*, 590 S.W.3d at 322 (quoting Section 514.060) (emphasis supplied by court).

The Court then ruled that "[t]he sunshine law is just such a case 'in which a different provision is made by law.'" *Id*. It explained that "[c]ost awards, along with attorney fees and civil penalties, are among the available remedies for sunshine law

violations under section 610.027." *Id*. The Court then quoted the following relevant provision of Section 610.027.3:

> Upon a finding by a preponderance of the evidence that a public governmental body or a member of a public governmental body has knowingly violated sections 610.010 to 610.026, the public governmental body or the member shall be subject to a civil penalty in an amount up to one thousand dollars. *If the court finds that there is a knowing violation of sections 610.010 to 610.026, the court may order the payment by such body or member of all costs and reasonable attorney fees to any party successfully establishing a violation.*

Id. at 322-23 (emphasis supplied by court). The Court noted that Section 610.027.4 similarly allows a party that establishes a purposeful violation to recover costs and attorney's fees. *Id*. at 323.

The Court then held that because the Sunshine Law only provides for recovery of costs to parties that **established** a governmental body had acted knowingly or purposefully—and not for governmental bodies which had **defeated** such claims—the Board had no right to its costs. *Id*. at 323.

In further explaining its ruling, the Court wrote that "the sunshine law must be read as a whole, and other sections are not silent as to the right of governmental bodies to costs." *Id*. It noted, for example, that Section 610.027.6 provides that "even when the governmental body acts as a plaintiff in bringing a declaratory action to determine for itself the legality of closing a public meeting, record, or vote, it must do so at its own expense – it has no right to costs regardless of whether the court determines the meeting or document is subject to disclosure." *Id*.

"In so providing, the legislature has demonstrated it was aware of the issue of whether a governmental body could obtain costs, and yet chose to provide that only a party successfully establishing a violation could obtain costs. It clarified that even when acting as a plaintiff in a declaratory judgment action the public body could not obtain costs. Had the legislature wanted a governmental body to be entitled to an award of costs in other circumstances, it would have said so." *Id*.

Amici believe that when applied to the issue before the Court in this case, the reasoning this Court applied in *Roland* necessitates finding that governmental bodies cannot charge requestors for attorney review time.

B. Open and closed records

The Missouri Sunshine Law begins with the simple premise that "records … of public governmental bodies [are] open to the public unless otherwise provided by law." Mo. Rev. Stat. § 610.011.1. It then provides that governmental bodies are "authorized" to close records that relate to "[l]egal actions, causes of action or litigation involving a public governmental body and any confidential or privileged communications between a public governmental body or its representatives and its attorneys." Mo. Rev. Stat. § 610.021.1(1).

"Section 610.021 is 'permissive,' because it describes records that *may* be closed. Nothing in section 610.021 mandates the closure of records." *Chasnoff v. Bd. of Police Comm'rs*, 334 S.W.3d 147, 151 (Mo. App. E.D. 2011) (citing *Guyer v. City of Kirkwood*, 38 S.W.3d 412, 414 (Mo. banc 2001)) (emphasis in original).

In fact, Section 610.022.4 provides that "[n]othing in sections 610.010 to 610.028 shall be construed as to require a public governmental body to hold a closed meeting, record or vote to discuss or act upon any matter." Mo. Rev. Stat. § 610.022.4.

C. Exempt and non-exempt material

When a record contains material which is both exempt from disclosure and material which is non-exempt, it is the duty of the governmental body to segregate the material and produce the non-exempt material: "If a public record contains material which is not exempt from disclosure as well as material which is exempt from disclosure, the public governmental body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." Mo. Rev. Stat. § 610.024.1.

Repeated decisions by the Courts of Appeal have held that Section 610.024 imposes an affirmative obligation on the governmental body to undertake this review. *See, e.g., Laut v. City of Arnold*, 417 S.W.3d 315, 320 (Mo. App. E.D. 2013) ("the government agency receiving the request is obligated to separate exempt and non-exempt information, and to disclose the portions of the documents that are open to the public under the statute"); *State ex rel. Missouri Local Gov't Ret. Sys. v. Bill*, 935 S.W.2d 659, 664 (Mo. App. W.D. 1996) ("To the extent that the information Bill sought was contained in a record which also contained exempted information, LAGERS had an obligation to cull the requested information from the record and to disclose it.").

D. Fees for obtaining public records

The Sunshine Law's provisions regarding allowable fees for obtaining public records are contained in Section 610.026. Specifically, subsection 1 allows governmental bodies to charge for the following:

- Copying charges of not more than ten cents per page for paper copies not larger than legal size paper;
- Search time, research time, and duplicating time, "using employees of the body that result in the lowest amount of charges for search, research, and duplication time;"
- Actual duplicating time for oversize documents, *i.e.*, maps, blueprints, plats, etc., or non-paper records, *i.e.*, recording tapes, videotapes or films, slides, etc.; and
- If the requested records are stored on computer facilities, programming time, to the extent required "beyond the customary and usual level to comply with a request for records or information."

Mo. Rev. Stat. § 610.026.1.

II. In *pari materia* construction of the Sunshine Law compels the conclusion governmental bodies cannot charge for attorney review time

These provisions of the Sunshine Law, taken together, mean that governmental bodies cannot charge requestors for time spent by attorneys reviewing and redacting the records.

As this Court explained in *Roland*, the various sections of the Sunshine Law are to be read "in *pari materia*." 590 S.W.3d at 318-19. Here, Section 610.024.1 provides that if a record contains both non-exempt and exempt material the governmental body—not the requestor—bears the burden of redacting the exempt material.

But neither this section, nor the "fee" section, *i.e.*, Section 610.026.1, allows the governmental body to charge the requestor for this work.

Instead, Section 610.026.1 only allows the governmental body to pass on charges for copying records, time spent searching for records, programming time (if necessary), etc. In short, Section 610.026.1 allows a governmental body to charge the requestor for services that directly benefit the requestor by contributing to the production of the requested documents. In contrast, the time an attorney spends reviewing and redacting records only benefits the governmental body, which chooses (but is not required) to redact material which is exempt under Section 610.021.1(1).

Here, just as in *Roland*, the Legislature "has demonstrated it was aware of the issue of whether a governmental body could" charge a requestor fees to produce public records, 590 S.W.3d at 323, but the Legislature provided that a governmental body could only charge fees for certain specified services, none of which include the time spent by an attorney to review and redact records. Accordingly, just as in *Roland*, the governmental body has no statutory authority to condition disclosure of public records on payment for the time spent by attorneys to review public records.

As this Court noted in *Roland* regarding costs, the Legislature only allows **requestors** to recover attorney's fees under Missouri Sunshine Law. *Id.* First, the Legislature provided that a requestor can recover attorney's fees if they are successful in proving a governmental body knowingly or purposefully violated the Sunshine Law. *See* Mo. Rev. Stat. § 610.027.3, 4. Second, the Legislature has provided

that where a governmental body chooses to sue the requestor in a declaratory judgment action, the governmental body must pay the requestor's attorney's fees. *See* Mo. Rev. Stat. § 610.027.6.

Thus, under Missouri Sunshine Law, it is only the requestor who can shift his or her attorney's fees to the governmental body; the governmental body cannot shift its attorney's fees to the requestor. It was for this very reason that this Court rejected the St. Louis Election Board's attempt recover its costs from Roland. It would therefore be unreasonable to allow a governmental body, which cannot recover attorney's fees expended for litigation, to recover attorney's fees whenever it chooses to review and redact public records. [1]

[1] Missouri follows the "'American Rule,' which states that, 'absent statutory authorization or contractual agreement, each party bears the expense of his or her own attorney's fees.'" *Robinson v. Langenbach*, 599 S.W.3d 167, 188 (Mo. banc 2020). While this rule is ordinarily applied in the litigation context, it reflects a significant public policy that attorney's fees are exceptional charges which ordinarily must be borne by the person seeking such counsel.

In other settings, governmental bodies are not permitted to pass along the cost of seeking the counsel of in-house or outside attorneys absent some sort of specific authorization. Certainly, the rule ought to be no different where a governmental body seeks such counsel under the Sunshine Law. In enacting the Sunshine Law, the Legislature was well aware that attorney's fees were an extraordinary expense that should normally be borne by the entity seeking such services; although it made provision for recovery of attorneys' fees in specific limited instances, it included no provision allowing recovery of fees where an attorney's counsel is sought to review whether the records (or parts of them) are privileged.

III. *Strake v. Robinwood West Community Improvement District*

In his motion for judgment on the pleadings, Governor Parson conceded that Section 610.021.1(1) merely "authoriz[es]" closure of attorney-client privileged matters (as opposed to "requiring" their closure); he nevertheless asserted that his attorney had a conflicting "ethical obligation" that "required" the attorney to review the records for privilege. (D19 p. 11). But in *Strake v. Robinwood West Community Improvement District*, 473 S.W.3d 642 (Mo. banc 2015), this Court held that the Sunshine Law controls when such conflicting obligations arise.

John Strake requested from Robinwood a copy of a settlement agreement to which Robinwood was a party. When Robinwood refused, Strake sued, asserting that the agreement was an open record and that Robinwood had knowingly and purposefully violated the Sunshine Law in refusing to produce it. In its defense, Robinwood argued that the settlement agreement's confidentiality clause subjected Robinwood to "two mutually conflicting obligations," *i.e.*, its obligations under the Sunshine Law and its obligations under the confidentiality clause.

In finding that Robinwood purposefully violated the Sunshine Law by refusing to provide Strake with a copy of the settlement agreement, this Court found that Robinwood's statutory obligations under the Sunshine Law trumped its contractual obligations under the settlement agreement: "Robinwood's decision to withhold the requested documents [] to avoid potential contractual liability amounts to 'purposely' violating the Sunshine Law as part of a "'conscious design, intent, or plan'

to violate the law ... 'with awareness of the probable consequences.'"" *Id* at 646 (quoting *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. banc 1998)).[2]

Thus, to the extent the Governor's counsel believes it has an ethical obligation to review public records before producing them, that conflicting ethical obligation cannot impose a financial obligation on the requestor that the Sunshine Law does not.[3] The Governor therefore asserts a false conflict.

IV. Attorney review time is not "search, research, [or] duplication time"

Recognizing that a governmental body can only charge fees which the Legislature has authorized, Governor Parson argued in the circuit court that the time his attorney spent reviewing and redacting the e-mails which Elad Gross had requested

[2] *Strake* is consistent with this Court's jurisprudence that where a governmental body faces competing demands relating to the disclosure of open records, the tie goes to the "open record" demand imposed by Section 610.011.1. *See Guyer v. City of Kirkwood*, 38 S.W.3d 412, 414 (Mo. 2001) ("section 610.011.1 should be used as a tiebreaker in favor of disclosure").

[3] The Governor also argued below that because the last sentence of Section 610.021.1(1) states that "[l]egal work product shall be considered a closed record," closure of attorney work product is "required." (D19 p. 11). But there are two problems with this argument. First, it is based on a misreading of Section 610.021, which plainly states that a governmental body "is authorized to close … records … to the extent they relate to" the following subdivisions—including subdivision (1). Accordingly, work product is not "required" to be closed; instead, the sentence simply means that work product—along with the previously mentioned "[l]egal actions, causes of action or litigation"—are within the scope of subdivision (1). Second, even if work product was required to be closed (which it is not), the sentence to which the Governor points does not impose an obligation on the requester to pay for an attorney to review records for work product.

was "research time," pursuant to Section 610.026.1(1). (D19 pp. 9-10). The Governor's attempt to fit a square peg into a round hole is unavailing.

Section 610.026.1(1) provides as follows:

> Fees for copying public records… shall not exceed ten cents per page for a paper copy not larger than nine by fourteen inches, with the hourly fee for duplicating time not to exceed the average hourly rate of pay for clerical staff of the public governmental body. **Research time** required for fulfilling records requests may be charged at the actual cost of research time. Based on the scope of the request, the public governmental body shall produce the copies using employees of the body that result in the lowest amount of charges for search, **research**, and duplication **time**.

Mo. Rev. Stat. § 610.026.1(1) (emphasis added).

As can be seen, "research time" is referred to twice in subdivision (1). First, the subdivision provides that "[r]esearch time **required for fulfilling records requests** may be charged at the actual cost of research time." Here, as noted in section I(B), *supra*, Governor Parson was not required to redact materials that qualify for the "legal records" exemption. So he could have "fulfill[ed]" Gross' request without having an attorney conduct a privilege review of the requested records.

The distinction between "fulfilling" a request for records and conducting a privilege review is well-established in the analogous field of document production in litigation. For example, while a litigant can be charged for computer time spent by an opposing party to research and locate responsive documents that are on diffi-

cult-to-read tape backups, "the responding party should *always* bear the cost of reviewing and producing electronic data once it has been converted to an accessible form." *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003).

The primary reason for this rule is simple: "the producing party is the sole beneficiary of privilege review." *Electronic Discovery and Cost Shifting: Who Foots the Bill?*, 38 Loy. L.A. L. Rev. 1639, 1664 n.191 (2005) ("The producing party benefits from the privilege review, as it is the party asserting the privilege."). It necessarily follows, therefore, that the producing party under Missouri Sunshine Law should also bear the cost of the privilege review.[4]

Subdivision (1) again refers to "research time" when it states, "the public governmental body shall produce the copies using employees of the body that result in the lowest amount of charges for **search, research, and duplication time**."

"When a statutory term is not defined, courts apply the ordinary meaning of the term as found in the dictionary." *Great S. Bank v. Dir. of Revenue*, 269 S.W.3d 22, 24–25 (Mo. banc 2008). The term "research" is defined as "careful or diligent search;" "studious inquiry or examination;" and "the collecting of information about

[4] This analogy also applies to the Governor's argument that because he was "required" to review the records—either under his counsel's "ethical obligation" or because work product is a closed record, *see supra* n.3—requestors must pay for the privilege review. Parties to litigation are "required" to produce documents in response to a request from an opposing party. Despite this fact, parties cannot shift the financial burden of conducting a privilege review onto the party who requested the documents.

a particular subject." *Research,* Merriam-Webster, https://www.merriam-webster.com/dictionary/research (last visited December 21, 2020).

This meaning is consistent with the other words in the subdivision, *i.e.*, "search" and "duplicate." "Research time" in this subdivision thus plainly relates to the process of locating potentially responsive documents (*i.e.*, making a "careful and diligent" search for them), "collecting" them, and then copying them (*i.e.*, "duplicating" them), to make them available to the requestor.

This reading of subdivision (1) comports with a well-known principle of statutory construction: When "the word at issue appears in the statute within a list of words, the Court will apply the principle of statutory construction known as *noscitur a sociis*—a word is known by the company it keeps. Under this principle, a court looks to the other words listed in a statutory provision to help it discern which of multiple possible meanings the legislature intended." *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 122 (Mo. banc 2014) (internal citations omitted).

Thus, the words used in Section 610.026.1(1) all relate to the process of locating responsive documents and making them available to the requestor. They do not relate to the entirely separate process of reviewing[5] documents to determine whether they contain exempt information.

[5] The term "review," which the dictionary defines as "to go over or examine critically or deliberately," *Review,* Merriam-Webster, https://www.merriam-webster.com/dictionary/review, has an entirely different meaning than "researching." The Sunshine Law does not allow governmental bodies to charge "review time."

Assuming that attorney review is warranted, the documents requested under the Sunshine Law already will have been retrieved and examined for responsiveness. At that point, the process of "research" has concluded. Attorney review of a document once found is outside the context of researching, collecting, and duplicating the information. Reading anything further into the statute, including allowing charges for attorney review, contravenes Supreme Court precedent that the statute is to be liberally construed to promote transparency in government; to limit impediments to disclosure; and that any ambiguity or uncertainty should be resolved in favor of promoting disclosure. *Guyer v. City of Kirkwood*, 38 S.W.3d 412, 414 (Mo. banc 2001).

In fact, here, the Governor has conceded the "searching, researching, and duplicating" work necessary to "fulfill" the request is finished: in his motion for judgment on the pleadings, the Governor stated that "[t]he Governor's Office ha[s] located over 13,000 potentially responsive documents." (D19 p. 1). As such, the Governor does not need to conduct further "research" in order to "fulfill" Gross' request.

For these reasons, time spent by an attorney reviewing and redacting responsive public records is not "research time."

V. Section 610.225 – Tax credits

In *Roland*, this Court found that by including certain "cost" provisions in the Sunshine Law, the Legislature had "demonstrated it was aware of the issue" and

specifically chose to limit cost awards to requestors, to the exclusion of governmental bodies. 590 S.W.3d at 323. So, the Court reasoned that "[h]ad the legislature wanted a governmental body to be entitled to an award of costs in other circumstances, it would have said so." *Id*.

Here, the Legislature has provided that a governmental body can collect the cost of redacting records in one limited scenario: when the records contain material concerning pending tax credit applications.

Specifically, subsection 1 of Section 610.225 provides as follows:

> **Records and documents relating to tax credits** submitted as part of the application for all tax credits to any department of this state, board, or commission authorized to issue or authorize or recommend the authorization of tax credits **shall be deemed closed records until such time as the information submitted does not concern a pending application**, and except as limited by other provision of law concerning closed records.

Mo. Rev. Stat. § 610.225.1 (emphasis added). A "pending application" is defined as "any application for credits that has not been authorized." *Id*.

Subsection 2 provides:

> Upon a request for opening of records and documents relating to all tax credit programs, as defined in section 135.800, except as limited by the provision of subsection 1 of this section, the agency that is the recipient of the open records request shall make information available consistent with the provisions of this chapter.

Mo. Rev. Stat. § 610.225.2. The referenced section, *i.e.*, Section 135.800, provides that "all tax credit programs" is synonymous with "any tax credit program." Mo. Rev. Stat. § 135.800.1(3).

Subsection 2 further provides that:

> Where a single record or document contains both open and closed records, the agency shall make a redacted version of such record or document available in order to protect the information that would otherwise make the record or document a closed record. Staff time required for such redaction shall constitute an activity for which a fee can be collected pursuant to section 610.026.

Mo. Rev. Stat. § 610.225.2.

Thus, taken together, these provisions provide that (1) a document relating to a pending tax credit application is a closed record; but once the application has been "authorized," the document becomes an open record; (2) to the extent a document contains information about both pending and authorized applications, the information about the pending applications "shall" be redacted; and (3) the cost of redacting the information in the document about the pending application can be passed on to the requestor.

This provision is relevant for four reasons. First, redaction of pending tax credit application information is a clerical task that does not require an attorney; instead, all one needs to know is whether the application is pending or not. Thus, there is nothing in Section 610.225.2 which would allow time spent by an attorney reviewing and redacting records to be charged to a requestor.

Second, this section appears to allow for recovery of redactions costs because, unlike the "permissive" exemptions contained in Section 610.021, this section contains a mandatory closure provision: "Records and documents relating to

tax credits … **shall be deemed closed records** until such time as the information submitted does not concern a pending application." Mo. Rev. Stat. § 610.225.1 (emphasis added).

This is followed by the explicit mandate that "[w]here a single record or document contains both open and closed records, the agency **shall make a redacted version of such record** or document available in order to protect the information that would otherwise make the record or document a closed record." Mo. Rev. Stat. § 610.225.2 (emphasis added).[6]

Third, while providing that the time spent to make the required redactions "shall constitute an activity for which a fee can be collected pursuant to section 610.026," the Legislature notably did not refer to this time as "research time." Redaction time is thus distinct from "research time," and recovery of redaction costs is limited to the circumstances of Section 610.225.2.

Fourth, and most importantly, the fact the Legislature expressly allows recovery of time spent redacting these very specific types of records shows that "[h]ad the legislature wanted a governmental body to be entitled to [recover redaction] costs in other circumstances, it would have said so." *Roland*, 590 S.W.3d at 315.

[6] The mandatory closure and redaction provisions in Section 610.225 are designed to protect information which private parties have included in pending tax credit applications. Thus, redaction of this information does not serve to protect any governmental interest; instead, the redactions protect only private interests. This is unlike a privilege review, which benefits only the government.

VI. *White v. City of Ladue*

Governor Parson told the circuit court that the Court of Appeals' decisions in *White v. City of Ladue*, 422 S.W.3d 439 (Mo. App. E.D. 2013), supports his reading of "research time." (D19 p. 11). Again, Amici disagree.

In that case, the city responded to Larry White's Sunshine Law request by stating that some of the documents he had requested were closed records and he would have to pay $5,500 for an attorney to review the documents prior to production.

White sued, alleging the city's demand constituted a knowing or purposeful violation of the Sunshine Law. The city moved for summary judgment, arguing both (a) that charging for attorney review time is allowed under the Sunshine Law as "research time," and (b), in any event, it did not commit a knowing or purposeful violation by demanding payment for attorney review time.

In ruling on the city's motion, the court squarely rejected the city's first argument, finding that charging for attorney review time is not allowed under the Sunshine Law: "this Court determines that including attorney review time is not encompassed in research time under the statute." *White v. City of Ladue*, No. 10SL-CC01184, at *2 (St. Louis County Cir. Ct. Sept. 28, 2012).

The court went further, explaining the dangers in allowing governmental bodies to charge requestors for attorney review time: "The Court is concerned that allowing governmental entities to charge for attorney review has serious potential

to result in the negating of the purpose of the Sunshine Law by making it very difficult, if not impossible, for citizens to afford to exercise the rights given them under the Sunshine Law." *Id*. at *1. Such charges could very well "put[] the Sunshine Law out of reach" for many citizens. *Id*. at *2.

The court, however, granted the city's motion on the second prong of its argument, *i.e*., that it did not act knowingly or purposefully. Specifically, the court found that "because this is a case of first impression," White could not show the city knowingly or purposefully violated the Sunshine Law by demanding payment of attorney review time. *Id*.

White appealed the court's judgment, but only on the ground that he had proffered sufficient evidence to show a knowing or purposeful violation. The Court of Appeals disagreed, and affirmed the trial court's ruling that he had failed to show a knowing or purposeful violation. *White*, 422 S.W.3d at 453.

In its opinion, however, the court expressly stated that it was not ruling on whether attorney review time is an allowable charge under the Sunshine Law:

> We note that neither White nor the City has challenged the trial court's ruling that attorney's fees may not be charged as research time under the Sunshine Law. *The St. Louis Post–Dispatch* has filed an amicus curiae brief with this Court, urging that "allowing parties to charge for costs incurred for attorneys reviewing Sunshine Law [requests] ... undermines the purpose of the statute." However, as this issue is not raised in the instant appeal, we decline to address it.

422 S.W.3d at 452 n.10.

As such, the Court of Appeals in *White* did not find that attorney review time is "research time;" instead, it squarely avoided deciding that issue altogether. This case allows this Court to provide certainty on this issue, which has plagued Sunshine Law requesters for years and, too often, has placed legitimate requests economically out of reach, to the detriment of government transparency and accountability.[7]

VII. Public policy favors Amici's construction

In its decision in *Roland*, the Court stated: "Legislative intent with respect to public records is clear. The sunshine law expressly states, 'It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law.'" 590 S.W.3d at 319 (quoting Mo Rev. Stat. § 610.011.1).

Against this background, Amici's interpretation of the Sunshine Law, *i.e.*, that the law does not allow public governmental bodies to condition production of documents upon the payment of the costs of reviewing and redacting otherwise open records, is consistent with Missouri's public policy. This conclusion is perhaps best illustrated, ironically, by a decision from another state.

[7] The practice of using "research time" to price Sunshine Law requests out of reach for most requestors has become so prevalent the *Post-Dispatch*'s Pulitzer-Prize winning columnist Tony Messenger has given it a name; he calls it "Sunshine Law price gouging." *See* https://www.stltoday.com/news/local/columns/tony-messenger/messenger-animal-rights-group-wins-sunshine-law-case-against-university-of-missouri/article_5b2f1361-7e00-59de-996c-a45c5e696756.html (last visited December 21, 2020).

In *Courier Post v. Lenape Reg'l High Sch. Dist.*, 821 A.2d 1190 (N.J. Super. Ct. Law. Div. 2002), the court was faced with the question of whether a public governmental body can charge a requestor for attorney review time. In answering that question, the court examined both the statutory terms of the New Jersey law and its stated public policy.

The court began by pointing out that the New Jersey Open Public Records Act—like the Missouri Sunshine Law—obligates the government to separate closed information from open information and to produce the open information. Specifically, the court quoted the following, strikingly similar, provision from the New Jersey's law: "[I]f the custodian of a government record asserts that part of a particular record is exempt from public access … the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access and shall promptly permit access to the remainder of the record." *Id*. at 1199.

The court then noted that—like Section 610.024 of the Missouri Sunshine Law—this provision says nothing about the governmental body charging the requestor for such review and redaction; "[t]he Legislature could have enacted" such a fee-shifting provision, "but it did not." *Id*.

The court contrasted this lack of a fee-shifting provision with the public policy behind the New Jersey open records act which—like Missouri's Sunshine Law—favors openness: "The process of review and redaction, however, cannot be used to frustrate the goal of the Act … to 'promptly permit access to the remainder

of the record.' Redaction of privileged or confidential data cannot cause the release of otherwise public information to be placed in a strait jacket." *Id*. at 1200 (quoting Section 5(g) of the Open Public Records Act).

The same is true here. Amici can attest that with growing frequency governmental bodies in Missouri are "strait jacketing" public information by conditioning provision of admittedly open records (which may also contain closed information) on the payment of more and more exorbitant fees for attorney review time.

As noted above, the poster child of this sort of attorney review time abuse is *The Star*'s current dispute with Clay County. In that case, a reporter for *The Star* made a Sunshine Law request to Clay County for copies of the itemized billing statements which the County's private, outside "Sunshine Law counsel" had sent to the county for payment. The County responded that the reporter would first have to pay $4,200 to have the county's outside "Sunshine Law counsel" review his bills (at a rate of $373.50 per hour) to determine what portions, if any, of the bills he would allow the county to give to *The Star* reporter.[8]

The Star sued and the circuit court agreed with *The Star* that the Sunshine Law does not allow governmental bodies to recover for the time it takes attorneys to review and redact otherwise open records. *Cypress Media, LLC v. Clay County*,

[8] To add insult to injury, the County's outside lawyer said it would take him fifteen minutes to review a single page, or four pages an hour. Applying that same metric to this brief means it would take a reader seven hours to review this document.

Missouri, No. 19CY-CV05332, at *11-15 (Clay County Cir. Ct. Mar. 26, 2020). Clay County, however, has appealed the circuit court's ruling, and has relied on the circuit court's ruling in this case.[9] The appeal is currently pending before the Western District Court of Appeals. *See Cypress Media, LLC v. Clay County, Missouri*, Case No. WD83766.

VIII. The problems created by "in-house" v. outside counsel

The Star's lawsuit against Clay County raises a host of issues which this Court should consider. First, there is the obvious question of whether the Sunshine Law allows a governmental body to pass on **any** charges for attorney review time. But even more pressing is how to deal with the fact many—if not most—governmental bodies in Missouri do not have "in-house" staff attorneys; instead, like Clay County, they rely on outside counsel.

Section 610.026.1(1) explicitly states that "the public governmental body shall produce the copies **using employees of the body** that result in the lowest amount of charges for search, **research**, and duplication time." Mo. Rev. Stat. § 610.026.1(1). But what if the public governmental body does not have "employees of the body" who can perform a privilege review? The statute precludes such a governmental body from passing on the cost of private, outside counsel to perform such

[9] To Amici's knowledge, the only court in the State of Missouri that has ruled that attorney review time is "research time" is the circuit court in this matter.

a review because it provides that the only allowable charges for "research time" are charges accrued by "employees of the body."

It is, of course, well-accepted that "the construction of a statutory scheme 'should avoid unreasonable or absurd results.'" *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012). Amici submit it would be unreasonable to allow governmental bodies such as the Governor's Office, which employ attorneys, to be able to charge for attorney review time but not allow smaller governmental bodies, which do not employ attorneys, to pass on the cost of having a non-employee attorney perform the same review. And it would similarly be unreasonable to condition requestors' access to public records on paying outside counsel fees—at hourly rates such as the $373.50 charged by Clay County—to governmental bodies that lack staff attorneys.

Of course, the Court can prevent such an unreasonable construction by being faithful to the terms of the statute and not allowing governmental bodies to pass on **any** attorney review time—whether performed by an "employee of the body," or an outside attorney for the body.

CONCLUSION

For these reasons, the Court should rule that public governmental bodies may not charge for time spent by attorneys to review public records requested under the Sunshine Law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief contains the information required by Rule 55.03;

2. The brief complies with the limitations contained in Rule 84.06(b);

3. According to the word count function of counsel's word processing software (Microsoft Word) and excluding those portions of the brief as permitted by Rule 84.06(b) and Local Rule 41(D), the brief contains 6,270 words; and

4. The brief was served on registered users through the electronic filing system.

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An Attorney for Amici Curiae