SC98619

IN THE SUPREME COURT OF MISSOURI

ELAD GROSS,

Plaintiff-Appellant,

v.

MICHAEL PARSON, et al.,

Defendants-Respondents.

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

Brief of American Civil Liberties Union of Missouri and the Freedom Center of Missouri as *Amici Curiae* in Support of Appellant Filed with Consent

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Jurisdictional Statement

Amici adopt the jurisdictional statement as set forth in Appellant's brief.

Interest of *Amici Curiae* and Authority to File

The American Civil Liberties Union (ACLU) of Missouri is an affiliate of the national ACLU, a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 1.6 million members nationwide. The ACLU of Missouri has more than 19,000 members. In furtherance of their mission, the ACLU and its state affiliates engage in litigation, by direct representation and as *amici curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions.

The ACLU of Missouri strives to make sure governmental entities are transparent, accountable to the public, and compliant with the requirements of the Missouri Sunshine Law. The ACLU of Missouri not only makes dozens of Sunshine Law requests each year, it also litigates Sunshine Law cases on a regular basis throughout the state. A sampling of the Sunshine Law cases the ACLU has litigated includes: *Harper v. Mo. State Hwy. Patrol*, WD 82465, 2019 WL 5699937 (Mo. App. W.D. Nov. 5, 2019); *Malin v. Cole Cty. Prosecuting Att'y*, 565 S.W.3d 748 (Mo. App. W.D. 2019); *Farber v. Metro. Police Dep't of the City of St. Louis*, 558 S.W.3d 70 (Mo. App. E.D. 2018); *Bray v. Lombardi*, 516 S.W.3d 839 (Mo. App. W.D. 2017); *Reporters Comm. for Freedom of the Press v. Mo. Dep't of Corrs.*, 514 S.W.3d 24 (Mo. App. W.D. 2017); *Am. Civil Liberties Union of Mo. Found. v. Mo. Dep't of Corrs.*, 504 S.W.3d 150 (Mo. App. W.D. 2016); *Strake v. Robinwood West Cmty. Improvement Dist.*, 473 S.W.3d 642 (Mo. banc 2015); *Chasnoff v. Mokwa*, 466 S.W.3d 571 (Mo. App. E.D. 2015); *Chasnoff v. Mokwa*, 415 S.W.3d 152 (Mo. App. E.D. 2013); *Ishmon v. St. Louis Bd. of Police Comm'rs*, 415 S.W.3d 144 (Mo.

App. E.D. 2013); and *Chasnoff v. Bd. of Police Comm'rs*, 334 S.W.3d 147 (Mo. App. E.D. 2011).

The Freedom Center of Missouri is a nonprofit, nonpartisan organization dedicated to research, litigation, and education for the advancement of individual liberty and the principles of transparent, accountable, constitutionally limited government. The Freedom Center emphasizes the importance of the Sunshine Law as a critical tool for allowing citizens to inform themselves as to what government officials are doing with the authority and taxpayer resources the people have granted those officials. The Freedom Center litigates constitutional issues in state and federal courts and also litigates Sunshine Law cases on a regular basis.

This brief is filed with the consent of Appellant and Respondents.

Statement of Facts

Amici adopt the statement of facts as set forth in Appellant's brief.

Argument

This case arises out of a dispute over a citizen's request to access public records retained by Governor Mike Parson's Office (the "Governor's Office"). *Amici*'s position highlights two erroneous holdings in the circuit court's decision: that the Governor's Office could charge for attorney review time and that taking 120 business days (more than five months) to produce the requested records was reasonable as a matter of law.

The trial court's judgment and order to dismiss should be reversed and the case remanded for further proceedings.

I. The circuit court erred by permitting the Governor's Office to charge for attorney review time.

a. *Section 610.026 consists of two subsections that delineate different permissible fees depending on how the requested records are stored.*

Section 610.026.1 provides that public governmental bodies have the responsibility to "provide access to … public records" subject to two subsections.

First, subsection 610.026.1(1) applies to records that are maintained in hard-copy paper format. Specifically, subsection 610.026.1(1) provides, in relevant part, as follows:

> (1) **Fees for copying public records**, except those records restricted under section 32.091, 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.

(emphasis added).

Second, subsection 610.026.1(2) applies to, among other electronic records, records maintained on computer facilities. Specifically, subsection 610.026.1(2) states, in relevant part:

> (2) **Fees for providing access to public records maintained on computer facilities,** recording tapes or disks, videotapes or films, pictures, maps, slides, graphics, illustrations or similar audio or visual items or devices, and for paper copies larger than nine by fourteen inches shall include only the cost of copies, staff time, which shall not exceed the average hourly rate of pay for staff of the public governmental body required for making copies and programming, if necessary, and the cost of the disk, tape, or other medium used for the duplication. […] If programming is required beyond the customary and usual level to comply with a request for records or information, the fees for compliance may include the actual costs of such programming.

(emphasis added).

The two subsections delineate different types of fees that a public governmental body can charge for producing records. *See*, *e.g.*, *R.L. Polk & Co. v. Mo. Dep't of Rev.*, 309 S.W.3d 881, 885 (Mo. App. W.D. 2010) (recognizing that the treatment of records under the two subsections is distinct). In particular, the type of fees that a public governmental body can charge depend on how the requested records are maintained by the governmental body: in hard-copy format or on computer facilities. As relevant here, if a record is maintained electronically, a public governmental body is limited to the types of fees listed in subsection 2.

In *R.L. Polk*, a requester sought electronic records. The Court of Appeals rejected the public governmental body's argument that it could charge a per-record fee for those records because that fee was not among those categories of fees listed in subsection 610.026.1(2): "The legislature specifically chose to authorize a per record fee for paper

copies in section 610.026.1(1). Similar language is conspicuously absent from section 610.026.1(2), which imposes fee limitations for, among other types of records, records maintained on computer facilities. . . . Section 610.026.1(2) specifically limits the fee for providing access to public records maintained on computer facilities to include only the cost of copies, staff time, and the cost of the medium used for duplication." *R.L. Polk*, 309 S.W.3d at 885–86.

Likewise here, if the Governor's Office records are maintained on computer facilities, it is limited to charging only the categories of fees enumerated in subsection 2.

b. *Subsection 610.026.1(2) applies in this case because the requested records were maintained by the Governor's Office on computer facilities.*

On August 18, 2018, Mr. Gross sought "[a]ny and all records, communications, documents, emails, reports, and other material" sent from the Governor's Office or received by the Governor's Office from twenty-seven named individuals or entities after January 9, 2017 ("First Sunshine Request"). Because e-mail is omnipresent and regularly used to deliver records, documents, and reports in electronic format, the First Sunshine Request likely sought only documents maintained by the Governor's Office in an electronic format on computer facilities. This prospect was confirmed on September 21, 2018, when the Governor's Office advised Mr. Gross that it would be producing the responsive "records to you in a disk."

The fact that the Governor's Office was planning to produce the requested records on a disk establishes that *all* of the records were maintained on computer facilities. Indeed, one of the following scenarios must have occurred: (1) all of the requested

records were maintained in an electronic format and were therefore going to be produced on a disk; or (2) some of the requested records were originally maintained in hard-copy format, however, the Governor's Office chose to convert such records to an electronic format prior to producing them on a disk. However, in either scenario, *only* subsection 610.026.1(2) applies in this case because the requested records were maintained by the Governor's Office on computer facilities in an electronic format.

This Court's decision in *Hemeyer v. KRCG-TV*, 6 S.W.3d 880 (Mo. banc 1999), is instructive. Specifically, the Court recognized that although Chapter 610 does not define "retain," the plain and ordinary meaning of the word is "to hold or continue to hold in possession or use: continue to have, use, recognize, or accept: **maintain in one's keeping**...." *Id*. at 881 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1938 (1976) (emphasis added)). Moreover, the Court remarked that "[t]he plain and ordinary meaning of the word 'retain' does not specify a length of time for holding or maintaining." *Id*. at 882.

Consistent with *Hemeyer*, it follows that the Governor's Office maintained all the requested records in an electronic format on computer facilities. This is true even assuming, *arguendo*, that some of the requested records were converted from hard-copy format to an electronic format, and the Governor's Office held them in such a format for only a short time. The only thing that matters is that the Governor's Office planned to produce the records on a disk, which establishes that all of the records were maintained in an electronic format on a computer facility. Thus, it follows that subsection 610.026.1(2)

applies in this case because the requested records were maintained by the Governor's Office on computer facilities.

c. *Subsection 610.026.1(2) does not allow attorney review time to be charged.*

Again, subsection 610.026.1(2) provides, in relevant part, as follows:

> (2) **Fees for providing access to public records maintained on computer facilities**, recording tapes or disks, videotapes or films, pictures, maps, slides, graphics, illustrations or similar audio or visual items or devices, and for paper copies larger than nine by fourteen inches **shall include only** *the cost of copies,* ***staff time, which shall not exceed the average hourly rate of pay for staff of the public governmental body required for making copies and programming, if necessary***, and the cost of the disk, tape, or other medium used for the duplication. […] If programming is required beyond the customary and usual level to comply with a request for records or information, the fees for compliance may include the actual costs of such programming.

(emphasis added).

The underlined language in this subsection ("shall include only") makes it clear that the permissible fees listed are exclusive. *See State ex rel. SSM Health Care St. Louis v. Neill*, 78 S.W.3d 140, 144 (Mo. banc 2002) ("Giving each and every word its plain and ordinary meaning, the legislature's use and placement of both the words 'shall' and 'only' in [a statute] signifies on its face that the legislature intended to designate exclusively those [categories]"); *see also State ex rel. Hunter v. Lippold*, 142 S.W.3d 241, 245 (Mo. App. W.D. 2004) (remarking that "the legislature's use of the word 'shall' removes any discretion from the official who is directed to perform the specified act").

Nowhere in subsection 610.026.1(2) is research time permitted, much less *attorney review* time. Instead, the subsection narrowly provides that the governmental body can only charge citizens fees for the "cost of copies" and "staff time." There is no

express language that would authorize the recovery of attorney review time under subsection 610.026.1(2).

Contrary to the concurring opinion below, subsection 610.026.1(2) does not provide that "all" staff time can be recovered. *See* Concurring Opinion at 4–5. Indeed, the word "all" does not appear anywhere in the subsection. If the legislature intended for governmental bodies to recover "all" staff time, including, in particular, attorney review time, the legislature could have added such language when it amended section 610.026 in 2004. The legislature did not do so.

The concurring opinion further asserts that the operative language in the subsection, namely, "the cost of copies, staff time, which shall not exceed the average hourly rate of pay for staff of the public governmental body required for making copies and programming," "only limits the ***amount*** that may be charged for 'staff time'; it does not limit the categories of employees, or the particular tasks, which may constitute 'staff time.'" *See* Concurring Opinion at 4. This is a strained interpretation of the subsection.

"Staff time" must be interpreted in light of the dependent clause that follows. *See Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 122 (Mo. banc 2014) ("In determining the meaning of a word in a statute, the Court will not look at any one portion of the statute in isolation. Rather, it will look at the word's usage *in the context of the entire statute* to determine its plain meaning.") (emphasis added); *Keller v. Marion Cty. Ambulance Dist.*, 820 S.W.2d 301, 302 (Mo. banc 1991) ("Context determines meaning."); *Borden Co. v. Thomason*, 353 S.W.2d 735, 754 (Mo. banc 1962) (rejecting litigant's attempt to "remove the mentioned term from the context in which it is used").

When read alongside that modifying clause, it is clear "staff time" refers to time spent by staff required to make copies or program a computer to search for the requested records. Since these are the only two types of tasks that can be recovered under the subsection, the legislature reasonably limited the amount that a governmental body can seek to recover for these two tasks by stating that such amount "shall not exceed the average hourly rate of pay for staff of the public governmental body required for making copies and programming." This interpretation makes sense: the amount that the governmental body can charge for providing specific services, namely, making copies or programming, should be limited by the average hourly rate of pay for staff normally undertaking such tasks.

On the other hand, the concurring opinion's interpretation is untenable. It makes no sense that the legislature intended for a governmental body to recover for "all" staff time, yet restricted the amount that could be recovered by limiting it to the hourly rate for staff "making copies or programming." Assuming attorney review time can be recovered, should the governmental body charge the average hourly rate for staff making copies or the hourly rate for staff doing programming? And, why would charging either of the foregoing rates make sense since they have nothing to do with attorney review time? The Court avoids these thorny questions by applying a common canon of statutory interpretation: 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." *Union Elec. Co.*, 425 S.W.3d at 122. "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." Here, that means looking at the three-item list of permissible charges ("the cost of copies," "staff time," and "the cost of the disk, tape, or other medium"), including the dependent clause that follows "staff time" in that list.

When interpreted in light of their statutory context, neither "staff time" nor any other part of subsection 2 includes "attorney review time." A public governmental body cannot rely on that part of the statute to shift that cost to a records requester.

d. *Even assuming subsection 610.026.1(1) applies, this subsection also does not provide for the recovery of attorney review time.*

As discussed above, subsection 610.026.1(1) does not apply because the Governor's Office records sought were either already maintained electronically or were converted for the purpose of responding to the request and thereby became "maintained on computer facilities." But even assuming subsection 610.026.1(1) applies to some or all the requested records, the trial court still erred by allowing the Governor's Office to charge Mr. Gross for attorney time spent redacting or segregating the compiled records in order to close them—or parts of them—to the public. The research-time provision in subsection 610.026.1(1) is limited to "research time *required* for *fulfilling* records requests." (emphasis added). Putting aside for the moment that redaction time is not "research," any closure under the Sunshine Law is permissive, not mandatory; therefore, redaction or segregation time is never "required" in fulfilling a records request. *See Cox v. City of Chillicothe*, 573 S.W.3d 253, 258 (Mo. App. W.D. 2019) ("Section 610.021 is a

permissive statute that allows, **but does not require**, a governmental body to close certain meetings, records, and votes.") (emphasis added).

Because the Governor's Office had already undertaken the act of locating the records requested, the attorney would not, in fact, be conducting "research," but rather simply reviewing to determine what permissive redaction and withholding choices the Governor's Office might have. *See* D5, p.4 (indicating that 13,659 documents were located and 120 business days were needed to complete the request). The amount of time needed for document redaction is not listed in either subsection (1) or (2) as an allowable fee, nor can it reasonably be understood to be covered by subsection (1)'s research-time provision. This is a reasonable interpretation of the law given that, as noted, any redaction is permissive under the law. Simply put, an activity by a public governmental body that is *permissive* is not an action that is required in order to *fulfill the request*—even if it is required for some other reason.

Moreover, section 610.024.1 of the Sunshine Law separately requires that "the public governmental body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." Section 610.024 contains no reference to any additional fees associated with this sequestration requirement. The fact that the legislature does not allow a public governmental body to charge for sequestration supports the conclusion that it did not intend to allow public governmental bodies to charge for activities associated with the permissive closure that sequestration supports.

The majority below erroneously concluded that subsection 610.026.1(1) permits the recovery of attorney review time. *See* Majority Opinion at 11–13. Specifically, the majority commented that because the words "search" and "research" must have distinct meanings, the word "research" must mean the "studious inquiry or examination" of the requested documents. *Id*. at 12. Applying this definition, the majority concluded that an attorney's inquiry or an examination whether a document could be withheld based on confidentiality or privilege falls within the scope of the term research and, therefore, can be charged as a fee. *Id*. at 12-13.

The majority's conclusion is flawed because even if the term "research" means the "studious inquiry or examination" of the requested documents, it does not follow that the legislature intended that this term should apply to an attorney deciding whether a document can be withheld. Instead, considering that records requesters are members of the public who do not have the special knowledge of the public governmental body, it is more likely the legislature intended "research" to encompass the body's determination of what kind of records it retains that were were responsive to the request as well as where to find them. "Search," then, refers to the physical carrying out of the researcher's best guess of what and where to look.

For example, consider a genealogy enthusiast whose ancestor worked in a state department. He might request "all records relating to John Smith." In order to fulfill that request, someone from the public governmental body would need to determine what position John Smith held or what projects he participated in, and in what filing cabinet or warehouse his communications and memoranda might now be stored ("research"). Then,

someone from the public governmental body would need to actually go look in that location to see if the documents were there ("search").

Significantly, the foregoing steps—first, determining what records the body might have and where they were located and, second, going to look in that location—are "required for fulfilling records requests." In contrast, an attorney's decision about withholding documents is not required, but rather, permissive. Indeed, Section 610.022.4 expressly 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." (emphasis added). *See, e.g., Chasnoff v. Mokwa*, 466 S.W.3d 571, 577–78 (Mo. App. E.D. 2015) ("Section 610.021 is permissive because it describes records that *may* be closed. The Sunshine Law does not prohibit the Board from disclosing the [permissively closable] records at issue.") (internal quotation marks and citations omitted).

Here, the circuit court thought attorney review time could be passed on to Mr. Gross because his request covered materials that might be withheld because of attorney-client privilege. Although attorney-client privilege may provide a basis for withholding (or redacting parts of) public records before disclosing them in response to a Sunshine Law request, exercising that option is not required in order to *fulfill a records request*. Even where it might make sense for the public governmental body to exercise its option of permissively closing records or parts of records, the Sunshine Law does not require this choice. Competing demands on a governmental body are not attributable to the Sunshine Law. *See Strake v. Robinwood W. Cmty. Improvement Dist.*, 473 S.W.3d 642,

646 (Mo. banc 2015). Thus, subsection 610.026.1(1) does not provide for the recovery of attorney review time.

Furthermore, to the extent there is a question about the meaning of a provision within Chapter 610, that provision should interpreted to favor open government. *See* RSMo. § 610.011. Attorney time can be prohibitively expensive. If requesters are always saddled with the cost of attorney review—particularly when there is nothing in the statute that makes that cost clearly attributable to the requester—citizens will be discouraged from requesting public records from public governmental bodies, and overall, the public will be less informed. This runs contrary to the public policy and presumption of openness described in section 610.011.

II. The circuit court erred by determining that 120 business days was reasonable to produce 13,000+ records *as a matter of law*.

Ordinarily, all valid requests for records under the Sunshine Law "shall be acted upon as soon as possible, but in no event later than the end of the third business day following the date the request is received…." RSMo. § 610.023.1(3). If access to the records requested is "not granted immediately, the custodian shall give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection." *Id.* The statute provides that the time for "document production may exceed three days for reasonable cause." *Id.*

Perhaps it is unreasonable to expect a government body to comply with a request that encompasses more than 13,000 records in three or fewer days. It is difficult to judge in this case because, despite the mandate of § 610.023, the Governor's Office did not give

a "detailed explanation" of the reason for the delay, nor allege any "reasonable cause." Instead, the Governor's Office merely referred to the amount of records requested and said it would take 120 business days (or 5.6 months) to produce them.

On the record at the motion-to-dismiss stage, the circuit court should not have found as *a matter of law* that it was lawful for a public governmental body to give itself more than five months to provide access to public records. The circuit court based its decision solely on the size and "voluminous and complex nature of Gross' request."

At a minimum, the court must make a factual determination as to what amount of time for a particular response is reasonable after a hearing in which the parties can explain the basis of their positions and the court can judge the credibility of witnesses. After all, there is nothing inherently unreasonable about expecting that a public governmental body can provide access to 13,000 records in a much shorter time than five months. Discovery requests routinely encompass thousands of responsive documents, and parties have only 30 days to produce them without further leave of court. Just as routinely, such records are produced on time. *See Prime Aid Pharmacy Corp. v. Express Scripts, Inc*., 2017 WL 67526, at *5 (E.D. Mo. Jan. 6, 2017) (granting motion to compel on Jan. 6 and requiring production of documents concerning more than 70,000 pharmacies be produced by Jan. 31).[1]

Reversal and remand is appropriate here because the reasonableness of delay involves questions of fact that cannot be resolved on a motion to dismiss.

[1] The Governor's Office is not a large corporation, of course, but the volume of public records here is several orders of magnitude smaller.

Conclusion

The trial court erred in finding that attorney review time is an allowable fee chargeable to a person requesting records from a governmental body and in declaring as a matter of law that more than five months is a reasonable amount of time to produce the requested records. The judgment and order dismissing the case should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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Certificate of Service and Compliance

The undersigned hereby certifies that on December 23, 2020, the foregoing *amici* brief was filed electronically as an attachment to the motion for leave to file amicus brief and served automatically on the counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06 and Local Rule 41; (3) contains 4,298 words. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert