**IN THE CIRCUIT COURT OF COLE COUNTY**
**STATE OF MISSOURI**

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| MISSOURI ALLIANCE FOR FREEDOM, INC., | ) | |
| Plaintiff, | ) | Case No. 17AC-CC00365 |
| v. | ) | |
| STATE AUDITOR NICOLE GALLOWAY, | ) | |
| Defendant. | ) | |

**DEFENDANT'S MOTION TO DISMISS AND SUGGESTIONS IN SUPPORT**

Pursuant to Rule 55.27(a)(6) Mo. R. Civ. Proc., Defendant moves this Court to dismiss Plaintiff's Petition for failure to state a claim upon which relief may be granted. In support, Defendants states as follows:

Purportedly under the Sunshine Law[1], Plaintiff demanded that the State Auditor's Office (SAO) produce all audit-related records from two audits (most or all of which would be confidential under Chapter 29 RSMo, as well as other statutes), years of communications of the Auditor and, most curiously, years of communications of the Auditor's attorneys (a significant bulk of which would be protected by attorney-client privilege). As would be expected based on the language of the request, Plaintiff was denied some records and was provided with citations to long-established confidentiality provisions of Chapter 29 RSMo, long-established attorney-client privilege doctrine, and a variety of other predictable impediments to release of

[1] Chapter 610 RSMo. Unless otherwise stated, all statutory references are to the Revised Statutes of Missouri, 2016.

confidential records.[2] Plaintiff then filed a four-count Petition claiming that the SAO improperly denied access to documents by failing to compile a log of the denied documents that included the date and subject matter of each, duties Plaintiff alleges are required by §610.023(4). ¶21, 40 (incorporated by reference into all counts). Plaintiff asks this Court to wholesale order the production of all requested records, though Plaintiff failed to identify the records in its Sunshine letters or this lawsuit.

**BACKGROUND AND APPLICABLE LAW**

In both the Missouri Constitution and statutes, the Missouri State Auditor is charged with establishing accounting systems for all public officials, auditing the accounts of all state agencies and other entitles receiving and spending public funds, and generally being the eyes and ears of the public when it comes to the handling of public funds. See Mo. Const. Art IV, Section 13, Chapter 29 RSMo. To accomplish this task, the Auditor is given broad authority to examine the books and papers of virtually any office handling public funds. §§29.130, 29.235. Most importantly in the case at bar, the Auditor is not limited to examining public documents, and accordingly, the Auditor is not authorized to make any government records connected with audits public except for the final published audit. The Auditor is also charged with responding to certain citizen concerns with how their tax dollars are being handled, including, as relevant here, the disposition/status of late individual tax refund checks from the Missouri Department of Revenue (MDOR)--an audit that is presently underway and from which Plaintiff wants to examine every related record which would include individual tax refund records from the MDOR. §29.221.

[2] Plaintiff sets forth most of the statutory citations in ¶21 of the Petition.

In April, 2017, the SAO released a routine audit of the State Treasurer's Office (STO). That same month, the SAO issued a subpoena to force the MDOR to provide the SAO with access to records to examine the department's timeliness of individual tax return refunds. Within weeks, the Missouri Alliance for Freedom (MAF) sent three letters to the SAO demanding all records "related to" both of these audits, as well as a complete compendium of communications maintained by the office in all forms and on all subjects to and from the Auditor since taking office, and to and from her most senior attorneys, each for a period exceeding two years. Petition Exhibits A-C.

Each of these letters was described by Plaintiff as a request made under the "Missouri Sunshine Law, Chapter 610 RSMo." While the Sunshine Law is an open meetings and open records enactment, Plaintiff identified only one actual "record" with any reasonable specificity, one that Plaintiff admits was timely provided. ¶¶19-20. Not surprisingly, since Plaintiff failed to identify particular records in Plaintiff's request letters, Plaintiff's Petition also fails to allege that particular records were denied, instead complaining generally that Plaintiff believes that all records requested were not produced. Thus, there is no focus in this lawsuit on any particular identifiable record or set of records, but instead a desire to somehow examine all possible records to see if, indeed, access should have been granted. This, Plaintiff alleges, is factually supported by Plaintiff's "information and belief." ¶¶22, 23, 30, 51, 60, 67, 76, 84. Missouri has specifically rejected the "notice" pleading approach of the federal courts that assumes "discovery will narrow and identify the issues for trial." *ITT Commercial Financial Corp. v. Mid-America Marine Supply Corp., 854 S.W. 2d 371, 379 (Mo. banc 1993)*. More plainly put, "[a]n

allegation of plaintiff's information and belief as to the existence of a fact essential to her cause of action is bad." *Meeker v. Chicago R.I. & P. Ry. Co.,* 255 S.W. 340, 342 (Mo. App. W.D. 1923).

In each of the counts of Plaintiff's Petition, Plaintiff alleges that broad categories of records were requested (all audit-related records[3]; all communications for two years), and that some subset of those records was denied on statutorily designated grounds. The stated grounds for denial of access to records was no more or less specific than the request for access itself. Plaintiff simply states that there is no cause for delay of production (¶¶35, 54), that the confidentiality laws governing the requests somehow do not apply (¶¶4, 21-24, 41, 42, 65-69, 77-78), and that the alleged violations of the Sunshine Law are purposeful (¶¶22, 55, 63, 69, 78, 85).

Elements of a Sunshine Law claim

The Sunshine Law was enacted to provide the public with access to government records (and meetings). *Stewart v. Williams Communications, Inc*., 85 S.W.3d 29, 32 (Mo. App. W.D. 2002). Exceptions to requested access in the law are to be strictly construed. *State ex rel. Missouri Local Government Retirement System v. Bill*, 935 S.W.2d 659, 664 (Mo. App. W.D. 1996). "A public governmental body is authorized to close…records which are protected from disclosure by law." § 610.021(14).

Stating a claim under the Sunshine Law is relatively simple. Assuming the entity is a public governmental body subject to the Sunshine law, a petition must allege that there was a request for access to a public record, that the request was received by the records custodian of

[3] In Plaintiff's May 2, 2017 request, Plaintiff specifically identified the subpoena issued to MDOR in Plaintiff's request. This was provided to Plaintiff within three business days. ¶20.

the entity, and that the entity did not respond to the request within three business days. Section 610.023.3; *Anderson v. Village of Jacksonville*, 103 S.W.3d 190, 195-195 (Mo. App. W.D. 2003); *Perkins v. Caldwell*, 363 S.W.3d 149, 153 (Mo. App. E.D. 2012).

Plaintiff's Petition fails on all three of these elements.

**I. Plaintiff has failed to adequately request access to a public record in any Count**

Broad, general requests for information or the use of language requiring interpretation are not sufficient to make a request under the Sunshine Law that can be enforced in court. The court in *Anderson v. Village of Jacksonville, 103 S.W.3d 190 (Mo. App. W.D. 2003)* provided a very straight-forward description of the requirements for a "request" under the Sunshine Law:

> [O]ne seeking access to public records must communicate a request in language that a reasonably competent custodian of the records would understand. The custodian must be able to identify records with reasonable specificity in order to be able to provide access to them.

*Id.,* at 196-197. With regard to any petition filed to enforce the request, *Anderson* said, "[t]he petition asserting the claim under the Sunshine Law must sufficiently inform the reader that a request for access to *reasonably identifiable public records* was made to permit the custodian of the records to recognize them." *Id*. (emphasis supplied).

In *Anderson,* the plaintiff sought records of ownership of properties owned by him, not specifying a particular property. The plaintiff expressed his request in a manner that would require the records custodian to first research what properties the plaintiff owned, and then locate and provide the records. Even acknowledging that the Plaintiff lived in a small community and it was likely common knowledge which properties he owned, that court found the request insufficient "on its face," noting that the request "does not seek access to any *expressed specific record*." *Id.* at 197 (emphasis supplied).

Even allowing for the broad public policy of openness in government, the Sunshine Law is precisely that--a law. Failure to comply with this law has consequences, some of which are penal. *See, e.g.,* §§610.027.3, 610.027.4. Accordingly, a public governmental body should be able to be reasonably certain as to whether or not it has complied with the law in granting access to records. If the request is such that the body is merely guessing as to whether it has complied or complied fully, then the request itself should be held to be insufficient.

Thus, an essential feature of the Sunshine Law, relevant to the case at bar, is that its subject matter is "records." It is not some form of governmental Wikipedia. This is a system driven by a request for access to records that is to be handled by a records custodian. The further we move away from this basic framework, the further we move from the Sunshine Law.

In the case at bar, the movement away from this basic framework assumes two forms: Plaintiff herein specifies no records[4], but instead couches its requests in very general language, and then asks that this general language be interpreted as broadly as possible.[5] Second, Plaintiff utilizes language in describing general categories of records that requires interpretation: Asking for records that "relate to" a subject requires a judgment by the records custodian after review of the content of a potentially responsive record or, depending on the breadth of the request, a review of virtually every record in the organization. In each of these instances, determining what access to grant amounts to guesswork. The reasonable specificity requirement in *Anderson* is not designed to permit government to evade a citizen's request for information: It is to enable a records custodian to find and provide the documents requested

[4] Plaintiff requested and received the MDOR subpoena and it is not the subject of this case.
[5] Plaintiff attaches all three letters to the Petition, and each letter contains lengthy instructions for its interpretation.

but "does not compel that the recipient custodian solve a mystery[.]" *Anderson,* 103 S.W.3d at 196.

**II. Plaintiff failed to allege that any of their three requests for documents was received by the records custodian, and no time period for response has been triggered.**

Plaintiff alleges that the three requests were sent to "Galloway" and that all three were received by "Galloway." ¶¶2, 3, 19, 39, 45. But Plaintiff does not allege receipt by the custodian of records, as required by §610.023.3 RSMo and *Anderson*, 103 S.W.3d at 194-195. Plaintiff attached the letters sent and they include the name of the Auditor and the name of the records custodian. But they fail to allege receipt. At best, these exhibits show that the documents were directed to specific individuals. Accordingly, this essential fact element was neither admitted nor denied.

The *Anderson* court found no allegation that the custodian of records received the plaintiff's request, and held that deficiency fatal to the claim. *Id*., at 199.

> The statute provides that the request for access is to be '*received by the custodian of records* of a public governmental body.' (emphasis added) § 610.023.3, RSMo 2000. The requester's burden includes ensuring that the request for access to records gets to the custodian of records.

*Id.*, at 198. In spite of the fact that the Village's attorney responded on behalf of the governmental body, and regardless of the fact that the governmental body corresponded with the Attorney General on its own behalf about the request, the failure to *allege* that the custodian of records received the request was fatal to the claim on a motion to dismiss for failure to state a claim. *Id*., at 198-200.

So strict is this pleading requirement that the Eastern District rejected a pleading that alleged that a Sunshine Law request was sent to a police chief who was explicitly alleged to

have "custody, possession, care, and control of certain public records," but not alleged to have been the custodian of records. *Pennington v. Dobbs*, 235 S.W.3d 77, 80 (Mo. App. E.D. 2007).[6]

It should be no challenge for Plaintiff to repair this deficiency with an amendment.

**III. Although Plaintiff alleges that there was a failure to respond to Plaintiff's request for access to information within three business days, Plaintiff's own allegations belie that assertion. Thus, Plaintiff's Petition fails in this element of pleading.**

Plaintiff alleges that the records request letters were sent on May 2, 9, and 26 (¶2), but Plaintiff goes on to allege, though perhaps not purposefully, that each was responded to within three business days: ¶¶19-20, 45-46, 72, 74. Plaintiff complains that Plaintiff did not receive all the documents requested, and questions the sufficiency of cited confidentiality laws, but the acknowledgement that Defendant acted upon the requests in a timely fashion satisfies the language of the statute: "Each request for access to a public record 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 by the custodian of records[.]" §610.023.3.

Even if Plaintiff alleges and proves that all records were not received within three business days, Plaintiff will not have shown a violation of the Sunshine Law. The language of the statute requires that each request be "acted upon" in that time period. *Id.* Readily available documents were indeed produced in that time period. ¶¶20, 23, 40. Additionally, as required by §610.023.3, Plaintiff acknowledges that Defendant made numerous communications to Plaintiff about the continued processing of Plaintiff's requests and estimated dates of production. ¶¶26, 27, 47, 48.

[6] From an evidentiary standpoint, the Chief of Police was, by ordinance, not the custodian of records in any event. However, the failure to explicitly plead that the custodian of records, whoever that was, received the request is a fatal pleading flaw.

Though Plaintiff may believe that all documents requested should have been produced within three business days, on the paucity of facts appearing in the Petition, Plaintiff has not shown a violation of the Sunshine Law as to the third element.

**IV. Failure to provide a descriptive log of denied documents does not violate the Sunshine Law.**

Plaintiff challenges the adequacy of Defendant's statutory citations for confidentiality provisions by alleging that Defendant failed in its duty to "identify the date and subject matter of records that Galloway asserted were confidential and did not provide a log of such documents." ¶¶21, 40. This, Plaintiff alleges, is required by §610.023(4). ¶¶21, 40.

The requirements of §610.023(4) are simple and brief:

> If a request for access is denied, the custodian shall provide, upon request, a written statement of the grounds for such denial. Such statement shall cite the specific provision of law under which access is denied and shall be furnished to the requester no later than the end of the third business day following the date that the request for the statement is received.

Plaintiff's request for a statement of grounds for denial of access was part of each request letter, not a communication served later that addressed specific documents. Though Plaintiff elected not to attach Defendant's response letters to the petition along with the related requests, Plaintiff acknowledged most, though not all, of the sections of law cited by Defendant that justified denial of access. These include §29.070 (information learned in an audit), §29.200.17 (audit work papers and related documents), §32.057 (confidentiality of certain documents from the MDOR), §610.021(17) (exempting records of communications between a public governmental body and its auditor), and §610.021(14) (Sunshine Law provision exempting records closed by law).

Plaintiff asks this Court to engraft an inventory and logging requirement into §610.023(4). This is akin to a civil discovery requirement where, for example, assertions of privilege require that sufficient detail be provided that a court or litigant can determine whether the privilege applies. Rule 58.01(c)(3). But this is a statutory action under the Sunshine Law, and no such requirement applies. In fact, such a requirement would seem unnecessary in an open records case where the denial of access to a reasonably specified record or set of records would leave little doubt as to what was denied. It is precisely because Plaintiff has not requested specific records that raises this question.

**V. Counts II and III should be dismissed. Both request audit-related records, with no further specificity, and both requests were responded to with citations to Missouri law making such records confidential.**

Plaintiff's May 2 and May 8 requests both demand access to all records related to two specified audits.

Plaintiff may wish to make all manner of arguments that Plaintiff should be permitted discovery on Defendant's Sunshine Law practice, and the production of logs (erroneously alleged by Plaintiff to be required by Missouri statute), etc. But the right to use the civil justice system for these ends is the statement of an underlying claim. Plaintiff requests records related to two audits--records which are confidential by statute.

Plaintiff requested "all records related to your audit of" two Missouri agencies. Section 29.200.17 prohibits release of audit-related records: "audit workpapers and related supportive material shall be kept confidential, including any interpretations, advisory opinions, or other information or materials used and relied on in performing the audit." So strong is the protection of audit information that an examiner who reveals any information the examiner

gains during an audit to anyone but the Auditor faces felony, not merely misdemeanor, charges. §§29.070-29.080.

Obviously, protection of audit documents is extensive due to the sensitive nature of the work done by the Auditor. The importance of the Auditor's ability to assemble the necessary information to perform an accurate audit is reflected in the statutory authority granted to the Auditor to have virtually unlimited authority to gain access to records within state government. §29.130. There is no stipulation that the Auditor may see only public documents, or only non-confidential documents. Plainly, the Auditor may access all documents without limitation.

These rules grant the Auditor a great deal of independence, and this is reflected also in the Missouri Constitution that requires that no duties may be imposed upon the Auditor other than those of supervising and auditing the receipt and expenditure of public funds. Mo. Const. Article IV, Section 13.

The significant responsibilities of the Auditor, accompanied by the almost unlimited authority to review documents, public, private, and confidential, must be accompanied by extreme care in safeguarding information obtained from auditees and other sources. In a 1979 judgment entered in Cole County Circuit Court, Judge Byron Kinder considered the many items that are included in audit-related documents including: the identity of persons providing information to the auditor, matters that may become the subject of prosecutions, unsubstantiated opinions of audit examiners, and confidential information obtained from other agencies through the power of the auditor's office. Judge Kinder summed-up many of the potential serious hazards of releasing audit-related documents:

> [Disclosure] of work papers would hinder the State Auditor and his office in the performance of his constitutional duties. … [T]o make an agency aware by publication

> of such information of the audit tests which have been previously used and will be used in auditing that agency weakens the validity of the tests. Public access to work papers containing references to persons supplying information would deter them from making the information available. Disclosure of unverified subjective opinions of examiners which lead to disclosure by parties who are not expert in audit work could result in harm to unsuspecting persons. Public disclosure of potential criminal prosecution could hinder such prosecution by alerting the suspect.

Judgment, *Tribune Publishing Co. v. Keyes*, Cole County Circuit Court No. 29439, May 8, 1979, p. 3 (Exhibit 1).

In an Attorney General's opinion several years earlier, the question of the confidentiality of records "relating to a particular audit" was addressed. In pertinent part, and in unequivocal language, the opinion stated that the scheme of Chapter 29 is to make audit reports public, but material gathered closed. Atty.Gen.Op. 209-75, p. 2. "[I]t is our view that the General Assembly took great care to provide for publicity of the final audit reports, but that it was highly sensitive to the impropriety of disclosing preliminary information which may or may not find its way into the final audit reports." *Id*. at 3. "The whole thrust of Chapter 29 … is to provide for the formal publication of official audits, and to provide for great care and discretion in guarding material which is not, itself, a part of the final audit." *Id.* at 4.

With this very clear backdrop, allowing a case to proceed, like the case at bar, utilizing discovery tools that might reach past a confidentiality provision can easily dismantle the authority and responsibility of the Auditor, and injure third parties as well. In particular, the language of Plaintiff's request for "audit-related documents" may as well have been to simply ask for "confidential documents." There could be no response other than to deny such a request, and a Sunshine Law suit based on such a denial would be pure baseless rhetoric. If a litigant could gain access confidential documents using the much stronger discovery devices in

such a manner, then the price of obtaining confidential documents would be no more than a filing fee. The only challenge any such plaintiff would have is to ensure that they request some class of records that would certainly be denied, and to do so in a way that would preclude a reasonable in-camera inspection (such as making exceeding broad requests for voluminous documents).

A records custodian must be able to understand from the request what records to produce or to which to provide access. This is essentially the requirement of *Anderson*, *supra* that access must be preceded by a request that identifies, within reason, a specific record. Confidential documents related to an audit are easily identified. But the universe of other communications that may be related to an audit requires reading, analysis, and varying opinion. A records custodian should be able to determine whether the legal obligations to provide access to requested records has been fully satisfied.

Plaintiff requested records using language that described a category of confidential records. Plaintiff's request did not identify any particular records, and the denial of Plaintiff's request was no more specific than the request itself. Accordingly, by the allegations of Plaintiff's own pleading, there has been no violation of the Sunshine Law.

Accordingly, on the face of the pleadings, Plaintiff has failed to state a claim for violation of the Sunshine Law with respect to any document request that is related to audits.

**VI. Counts I and IV should be dismissed. Neither count identifies any record that was denied to Plaintiff, but only that some records were denied under cited statutes. Additionally, both counts are directed to audit-related records.**

Counts I and IV are directed at more than two years of communications to and from the Auditor, her general counsel, and her former Senior Advisor (who also was an attorney with the

office). Like the previous requests, Plaintiff does not specify a particular document or set of documents. Accordingly, Plaintiff cannot direct the court to a document that was withheld, even by general description. However, unlike their requests for documents that are 'related to" some subject matter, communications are more readily searchable by a records custodian.

Plaintiff admits that they received responses to these requests within three business days, although Plaintiff complains that the documents were not received within that time frame. Requesting of the State Auditor, and her senior attorneys, all communications during the Auditor's term in office (over two years) will, at the very least, reach protected audit communications and attorney-client communications. Though searching for communications would involve less guesswork than search for documents that "relate to" audits[7], Plaintiff still fails to identify a record or set of records that is at issue.

**VII. Plaintiff's Petition should be dismissed for failure to plead facts in support of Plaintiff's claims.**

In the present case, Plaintiff pleads few facts beyond the sending of letters which show only that Plaintiff did not request access to reasonably identified records. Plaintiff's complaints that Plaintiff did not receive all the records to which Plaintiff was entitled are supported only by the phrase, "on information and belief."

Plaintiff is following a procedure more fitting for federal court procedures where discovery and summary judgment proceedings are the primary processes used to test whether a case should go to trial. In federal court, a plaintiff is only required to put a defendant on

[7] Directing a request for all records relating to any audit to a statewide office that does virtually nothing but audits could not possibly be more vague. Conceivably, almost every record in the organization could "relate to" any audit and to every audits.

notice of what the case is about. The discovery process is then used to ferret out any basic factual underpinnings. *Hickman v. Taylor*, 329 U.S. 495, 500-501 (1947). In contrast, Missouri uses the pleadings to identify the facts:

> Where the federal courts now use *discovery* to identify the triable issues, such has always been the role of the *pleadings* in Missouri. Where the federal courts now use *discovery* to identify the facts upon which the plaintiff's claim rests, such has always been the role of *pleadings* in Missouri. Finally, where the federal courts rely on *summary judgment* procedures to dispose of baseless claims, such continues to be the role of *motions to dismiss* in Missouri. In sum, Missouri and federal summary judgment practice correspond only in language, not in function.

*ITT Commercial Financial Corp., v. Mid-America Marine Supply Corp*., 854 S.W. 2d 371, 380 (Mo. Banc 1993).

Turning to Plaintiff's allegations, and assuming all to be true, there were three requests for documents, to which Defendant responded but clearly deferred full production pending reviews and searches. By implication, Plaintiff cannot allege that they will get no further documents, and plainly cannot allege that they were denied all documents. Plaintiff does clearly allege that they were denied some documents pursuant to confidentiality rules (Plaintiff did not append their pleading with Defendant's written responses). But Plaintiff does not identify any particular document or reasonably identifiable set of documents. There is nothing for the court to review except to undertake an examination of every document denied by reason of the statutes cited by Defendant. Plaintiff does not allege what these documents are because Plaintiff does not know.

The entirely of Plaintiff's "fact-pleading" in this case is summed up by the utterly meaningless phrase, "on information and belief." Plaintiff's case is awaiting discovery to determine the facts that should already be in the pleadings.

For the foregoing reasons, Plaintiff has failed to state a claim upon which relief may be granted and Plaintiff's Petition should be dismissed in its entirety.

Respectfully submitted,

*/s/ Joel E. Anderson*
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and related attachments were delivered via the Court's electronic filing system this 20 day of October, 2017 to:

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