IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

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

DEFENDANT'S REPLY TO PLAINTIFF'S AMENDED SUGGESTIONS IN OPPOSITION TO DEFENDANT'S MOTION FOR A PROTECTIVE ORDER

Defendant argued in its motion and in the hearing that conducting extensive discovery and, due to the highly regulated confidentiality of the categories of records that Plaintiff is requesting, litigating motions resulting from that discovery is wasteful and unduly burdensome when the production of documents is still underway. Seeking extensive discovery of and about documents before determining whether Plaintiff has already received the documents only makes sense if the purpose of the lawsuit is to supplant the Sunshine Law process with discovery tools that reach far beyond the tools available under the Sunshine Law.

The matter is further complicated by the fact that, with one exception[1], Plaintiff did not request specific records, but instead requested general categories of records (all records

[1] An audit and a subpoena were requested and admittedly received within three business days.

related to certain audits; all communications to and from attorneys, etc.). Defendant has concurrently filed a Motion to Dismiss that addresses this very point, but a lawsuit under the Sunshine Law must show that a request for access to *reasonably identifiable public records* was made such that a records custodian could recognize the records. *Anderson v. Village of Jacksonville,* 103 S.W.3d 190, 196-197 (Mo. App. W.D. 2003) (emphasis supplied). Broad, general requests for information or the use of language requiring interpretation are not sufficient to make an effective request under the Sunshine Law, and constitute a fatal flaw in pursuing a case in court. *Id.* Any claim Plaintiff might have would not be ripe until Plaintiff was denied some reasonably identifiable document or set of documents. Otherwise, Plaintiff could, in theory, sue in advance of the very Sunshine Law request over which Plaintiff purports to make its claim.

In Plaintiff's Amended Suggestions in Opposition to Defendant's Motion for a Protective Order (Plaintiff's Suggestions), Plaintiff has now clarified the intention of its case in a manner that makes clear why Plaintiff has not identified particular documents that Plaintiff believes were improperly withheld, and perhaps why Plaintiff did not communicate with Defendant about the documents they sought, or about any concerns with the production schedule: This case is not about the failure to provide access to particular records. Instead, it is about using

the discovery process to conduct Plaintiff's own document search or, more accurately given the highly sensitive nature of the categories of records at issue, having the court do it:

> *"[The SAO] has closed more than ten thousand pages of records, claiming that this information is confidential under some or all of a number of statutes.* ***This is a lawsuit to test some of those claims."***

Suggestions, p.2. There is no provision in the Sunshine Law for testing claims. The Sunshine Law provides a cause of action relating to closed records and meetings. Plaintiff suggests here that their case is about verification.

Documents that may be closed under the Sunshine Law may not be beyond the reach of a subpoena (or discovery) in an *appropriate* case. To follow Plaintiff's reasoning to its logical conclusion, a litigant who wishes to see confidential documents need only send a Sunshine Law request that (1) is worded in a manner that will unavoidably draw a denial (e.g., "all audit-related files" directed to an auditor; all internal attorney communications of an organization's in-house counsel); (2) ensure that the request is stated broadly enough that it would involve far too many documents to be reviewed in a reasonable hearing (e.g., every piece of communication of a statewide official for their entire term of office); and (3) file suit.

But Plaintiff's claim does not become ripe until Plaintiff can show (allege, at the pleading stage) that Plaintiff was denied some identifiable record. Waiting until production is complete would have, in theory, permitted Plaintiff to assess what was received and focus on any

concerns that Plaintiff might have. Instead, Plaintiff is only focused on what was not received and, accordingly, Plaintiff has still identified no documents at issue. Plaintiff's argument only underscores the primary deficiency in Plaintiff's case: They do not yet know what they want other than to test the SAO's document classification process.

Plaintiff's ripeness arguments are oversimplified. Plaintiff asserts ripeness by virtue of the fact that the Petition alleged that unidentified records were closed that should be open, and that all records requested were not provided within three days. Neither in the Petition nor in the Suggestions does Plaintiff identify these records.

The remainder of Plaintiff's argument addresses the sufficiency of Plaintiff's case and not its ripeness. Nevertheless, Plaintiff makes three points which will be briefly addressed.

First, Plaintiff claims that the SAO "unilaterally narrowed MAF's Sunshine request so that it conveniently matched 'closed records' criteria…. Leaving 697 records …out of initial productions." Suggestions, p. 1, 4. This is not a ripeness argument. It does, however, highlight the vague language Plaintiff used to make its request. Records "relating to" any subject matter is subject to interpretation. After receiving the SAO's responses to Plaintiff's requests, Plaintiff was of no assistance in tailoring its request to what Plaintiff wanted, nor did Plaintiff object in any way. In multiple letters to Plaintiff from the SAO, no response was ever received. Transcript pp. 16, 19, 22, 23, 28, 30, 31. Though Plaintiff requested all, not some, records

"related to" two audits, language pointing directly to Chapter 29's confidentiality provisions, Plaintiff here argues that the SAO misinterpreted their language, and that "all records relating to your audit of the Missouri Department of Revenue" (May 2 letter, Petition Exhibit A) and "records relating to your audit of the Missouri Office of State Treasurer" (May 8 letter, Petition Exhibit B) somehow excluded what Plaintiff now terms "core audit files[2]" (Suggestions, p. 9) that Plaintiff claims are protected by law.

Absent the identification of reasonably specific documents, this new terminology is of no assistance. Plaintiff still wants to see what they are not permitted by law to see in order to determine whether they should have been allowed to see it.

Plaintiff next objects to what Plaintiff terms "Galloway's Missing Communications." Plaintiff urges that the communications records Plaintiff requested (again, a category of documents) did not include, for example, text messages or e-mail prior to a certain date. Suggestions, p. 8-9. The State Auditor did not have an e-mail account until later in 2016 (Transcript, p. 45), and there were no text messages for the time period requested (Transcript, p. 49). Plaintiff may not believe this testimony, but the record from the hearing shows that there were no records to produce, and Plaintiff has neither alleged otherwise nor produced

[2] The term "core audit files" does not appear in the record in this case, the transcript of this hearing, Missouri statutes, or Missouri case law.

evidence of such a record. The Sunshine Law does not provide a cause of action for failure to produce non-existent records, so discovery connect with such a claim is not needed.

Finally, Plaintiff offers a section addressed to the future course of discovery. But this only takes the case back to its initial problems: the lack of specified documents. Plaintiff states that MAF only seeks to discover the justification for the withholding of records--but the assertion begs the questions itself. Because Plaintiff's case remains in the realm of vague categories of records, their proposed solutions resolve nothing. For example, Plaintiff states that "MAF has asked Galloway to produce the records requested and the records withheld." But then adds that Plaintiff is not seeking "core audit files" and then suggests that the Court order the SAO to produce everything that is not a "core audit file." Suggestions, p. 9.

Plaintiff attempts to escape the conundrum of demanding production in a civil case of documents Plaintiff is not entitled to by law by inventing the new phrase "core audit files" to describe the documents. Even if this term has a discernable meaning in the context of this case, what would the Court be ordering? Section 29.270 offers specific language on audit files. That section has been subject to at least one Attorney General Opinion (Atty. Gen. Op. 209): "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."

Plaintiff cannot render justiciable a case that Plaintiff continues to make in the abstract. In the final analysis, Plaintiff requested a category of documents which is confidential on the face of the request and in language that was drafted by Plaintiff. Plaintiff also requested a category of documents (communications), and with no further specificity only complains of a lack of trust that all documents have properly been produced. There is no relief that the Court can order on this without conducting the search and review itself. That is not supported by a claim made under Chapter 610, and until Plaintiff identifies a record at issue, there is no controversy to address. The fact that Plaintiff cannot tell which records were withheld is an inadequacy of Plaintiff's request, not the agency response.

Respectfully submitted,

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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 19 day of October, 2017 to:

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