IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
19th JUDICIAL CIRCUIT

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

PLAINTIFF'S SUGGESTIONS IN OPPOSITION TO
DEFENDANT'S SECOND MOTION TO DISMISS

Plaintiff Missouri Alliance for Freedom, Inc. ("MAF") respectfully submits its suggestions in opposition to Defendant Galloway's second Motion to Dismiss.

Factual and Procedural Background

In May, MAF sent Galloway three requests for public records. When she refused to produce them, MAF sought relief. MAF served its Petition on Galloway on July 21. Galloway filed an Answer on August 18.

On August 25, she filed what she styled a "Motion to Dismiss Or, Alternatively Motion for Protective Order." She filed a Notice of Hearing for the September 1 Law Day. As part of an agreement staying discovery until the Court rules on the Motion for Protective Order, Galloway agreed not to call the first Motion to Dismiss up for hearing.

On October 19, 2017, Galloway filed a second Motion to Dismiss "[p]ursuant to Rule 55.27(a)(6)." She filed a Notice of Hearing for the October 27, 2017 Law Day.

Argument

The Court should deny Galloway's motion because it is untimely. The motion, filed nearly two months after the deadline for responsive pleadings, serves not to identify a dispositive legal issue in the case but instead to divert the litigation into an endless eddy of pleading, re-pleading, and motion-upon-motion to dismiss. MAF respectfully suggests that there is a better course: order discovery targeted at the factual issues in the case and enter a Scheduling Order with a view toward a bench trial.

I. The Court Should Deny the Motion to Dismiss Because It Is Untimely

Rule 55.27(a) permits a party to raise certain defenses by motion instead of in a responsive pleading. Where a responsive pleading is permitted, "[a] motion making any of these defenses shall be made (A) within the time allowed for responding to the opposing party's pleading." Mo. S. Ct. R. 55.27(a). An answer must be filed with 30 days after service of the summons and petition. *Id.* 55.25(a).

MAF served Galloway with a summons and petition on July 21, 2017. Under Rule 55.25, her deadline to file a responsive pleading was August 22, 2017. She timely filed her Answer on August 18, 2017. On August 25—more than a week later—she filed her first "Motion to Dismiss." It was untimely. Now, almost two months after the

expiration of the time to file a responsive pleading, Galloway has filed another Motion to Dismiss. The motion is untimely. The Court should deny it.

II. Galloway's Untimely Second Motion to Dismiss Serves Only to Delay the Resolution of the Ultimate Factual Matters in this Case

Galloway's Motion to Dismiss presents no argument that disposes of this case. On the contrary, her arguments only demonstrate the need for factual development.

A. The Legal Standard

"A motion to dismiss for failure to state a claim is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom." *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. banc 1993). MAF need only plead the ultimate facts entitling it to relief. It need not plead evidentiary or operative facts. *Williams v. Barnes & Noble, Inc.*, 174 S.W.3d 556, 560 (Mo. App. W.D. 2005).

To state a claim under Chapter 610, a plaintiff need only show that "1) the body represented by defendants is subject to the Sunshine Law, and 2) the body has held a closed meeting, record, or vote." *Colombo v. Buford*, 935 S.W.2d 690, 694 (Mo. App. W.D. 1996) (citing § 610.027.2, RSMo.). Once MAF has pled that Galloway is a public governmental body and has closed a record, it is her burden to plead and prove that she has lawfully withheld records. § 610.027.2, RSMo; *Laut v. City of Arnold*, 491 S.W.3d 191, 194 (Mo. banc 2016). MAF had adequately pled that Galloway is a public governmental body and has closed records. Petition ¶¶ 11, 22-36, 40-42, 47-55.

B. *Anderson* Requires Only That a Request Permit a Custodian to Know Whether a Record is Responsive or Not

Galloway first argues that MAF has not identified the records it seeks. Mot. at 5-7 (citing *Anderson v. Village of Jacksonville*, 103 S.W.3d 190 (Mo. App. W.D. 2003)). Galloway did not raise this defense in any of her responses to MAF. *See* Petition ¶¶ 21-27, 34, 40-42, 46-48, 52-53. It is waived. *Am. Civil Liberties U. Fund v. Mo. Dep't of Corrections*, 12AC-CC00692, slip op. at 4-5 (Cole Cnty. Cir. Ct. Jun. 23, 2014).

Galloway is incorrect on the merits for three reasons. First, *Anderson* states only that a request must identify the records sought so that a custodian can tell whether a record is responsive. *See* 103 S.W.3d at 196. *Anderson* does not require the requestor to tell the custodian where to find a record; it is the custodian's responsibility to organize the records so that they can be located and produced. *See* §§ 610.023.1, 610.029, RSMo.

Second, *Anderson* does not require a requestor to know about and separately identify each single document it seeks. *Anderson* permits categorical requests that reasonably identify the category of documents to be produced. Courts require bodies to produce documents in response to categorical requests. *N. Kansas City Hosp. Bd. of Trustees v. St. Luke's Northland Hosp.*, 984 S.W.2d 113, 122 (Mo. App. W.D. 1998).

Third, *Anderson* does not state that if a public records request is difficult to apply as to *one* record, the public governmental body may refuse to produce *other* records that clearly are responsive. A body cannot deny wholesale a request simply because its application may be fuzzy on the margins.

MAF's requests were not ambiguous. Three requests sought communications to or from the Auditor, Paul Harper, and Douglas Nelson, from April 27, 2015 to the present. Petition Exs. A, C. A reasonably competent records custodian could identify such records by their envelope information. In almost all cases, such records could be identified by automated means.

MAF believes the evidentiary facts it has already developed fall within the averments of its original pleading; if necessary, however, MAF would amend its Petition to make it even clearer that its unambiguous requests were not satisfied. MAF would state that Galloway has refused to produce any text messages, voicemails, or voicemail transcripts from her entire tenure in office. MAF would further plead that she has refused to produce more than eighteen months of her emails. A reasonably competent custodian would have no difficulty identifying these records as responsive to MAF's requests.

MAF also sought records "relating to" several audits. Petition Ex. A, B. MAF defined subsets of such records to ensure Galloway produced them. *E.g.*, *id.* Ex. A ("This request includes, but is not limited to . . . All records relating to your decision to audit the timeliness of the Department's issuance of tax refund").

Galloway produced almost no records responsive to these requests. *Id.* ¶¶ 20-24, 40-42. She never claimed she could not identify the records; instead, she claimed that they were closed. *Id.* ¶¶ 23, 42. She now contends that no reasonable custodian could

determine whether a record relates to a particular audit. Mot. at 6. This is implausible, and is logically inconsistent with her earlier certainty that all of the records were closed.

Galloway's post hoc assertions of ambiguity highlight the need for discovery and a trial of the facts in this case. How did she decide whether a record was responsive? How did she decide whether or not to close a record? These issues lie at the heart of this lawsuit; serial motions to dismiss followed by ever-lengthier pleadings will not resolve or clarify them. As MAF shows below, the path forward is quick discovery followed by stipulations and a modest one-day bench trial.

C. Section 610.023.4 Requires Sufficient Justification to Evaluate the Asserted Defense

Galloway acknowledges that § 610.023.4 requires a public governmental body to provide a "statement of the grounds" for its withholding of records. Mot. at 9. The statute requires the statement to "cite the specific provision of law under which access is denied." *Id.* MAF requested such a log in each request. Petition Ex. A-C. Galloway argues that her recitations that records "are confidential under Sections 29.070, 29.200.17, 32.057, 610.021(14), and 610.021(17), RSMo" satisfy this requirement. Mot. at 9; *see* Petition ¶¶ 21, 24, 40. She has never produced a log. Petition ¶¶ 21, 40.

In other words, Galloway would hold MAF to a requirement that it must identify each document that it requests—and does not possess—individually. *See* Part II.B, *supra*. In the meantime, Galloway asserts the right to withhold records—whose contents

only she knows—categorically. Indeed, Galloway will not even describe what she is withholding. This turns Missouri's policy on its head. *See* § 610.011, RSMo.

The Court should apply *Anderson* to both parties. MAF accepts *Anderson*'s injunction that it must reasonably describe the records it seeks. The Court should enforce on Galloway the corresponding obligation—imposed by Missouri law—to justify withholding each record. § 610.023.4, RSMo. Such logs—often called *Vaughn* indices—are a staple of public records litigation, and are the only way the parties and court can avoid an *in camera* inspection. *E.g.*, *Missouri Coal. for Env't Found. v. U.S. Army Corps of Engineers*, 542 F.3d 1204, 1209 (8th Cir. 2008); *see also N. Kan. City Hosp. Bd. of Trustees v. St. Luke's Northland Hosp.*, 984 S.W.2d 113, 115 (Mo. App. W.D. 1998) (court conducted *in camera* inspection).

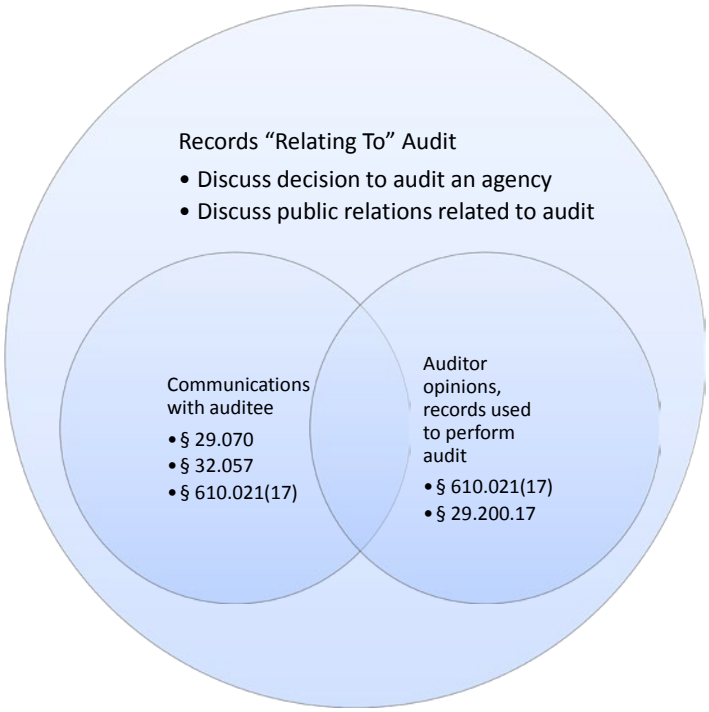
Had Galloway provided or at least promised a log in her responses, she could have assuaged MAF's reasonable (and growing) concerns that she has improperly withheld documents. Her continued attempts to conceal her justifications for withholding documents behind boilerplate string-cites of statutes demonstrate the ongoing need for discovery and eventual trial of her decisions.

D. Missouri Law Does Not Protect All Records "Relating To" an Audit

Galloway argues that she is entitled to dismissal of MAF's claims because every record "related to" an audit is exempt from disclosure.[1] Mot. at 10-13. Elsewhere in her brief, she argues that every record in the agency is potentially "related to" an audit, thus claiming a blanket exemption from the public records laws for her entire office. Mot. at 14 n.7. As MAF discussed in its opposition to Galloway's Motion for Protective Order, this is incorrect. Missouri law closes a core subset of such records, but MAF seeks many records outside that core.

Missouri law does close a core of records containing information received from an auditee. *See* § 29.070, RSMo. Missouri law also closes "auditor work product" developed during an audit through review of information from the audited agency. *See* §§ 610.021(17), 29.200.17, RSMo.; Op. Atty. Gen. No. 209 (Oct. 20, 1975). As MAF noted in its Suggestions in Opposition to Motion for Protective Order, it does not seek core audit records and does not ask Galloway to produce a log or index of core audit records.

[1] Galloway's argument that the Court should dismiss Counts I and IV, concerning MAF's requests for Galloway's, Harper's, and Nelson's correspondence, on the ground that those requests are "directed to audit-related records" is unsupported by any fact alleged in the Petition.



But many records "relating to" an audit are not protected. None of these statutes protects communications about the decision to audit an agency,[2] deliberations concerning the pros and cons of auditing an agency, communications about the political implications of an audit, or communications about public relations strategy relating to an audit. From its request to its Petition to its briefing, MAF has consistently reiterated its request for these records. *E.g.*, Petition ¶ 17, Ex. A. They are not confidential.

If necessary, MAF proffers that it will amend its petition to state that Galloway has inconsistently closed records under the exception for core audit records. After MAF filed this action, she produced 697 pages of previously closed communications with

[2] If production implicates anonymity of a whistleblower under § 29.221, RSMo., Galloway should redact the identifying information rather than close the record. *See* § 610.024, RSMo.

third parties "relating to" an audit. Nonetheless she has withheld every communication to or from Paul Harper that "relates to" an audit. This inconsistency raises material concerns about her decisions to close records.

Galloway argues that every document "relating to" an audit is confidential. This is incorrect. Some documents that relate to an audit will be protected to the extent that they incorporate information provided by the auditee. Other documents that relate to an audit will not. This is a fact-specific inquiry.

E. MAF Pled Receipt by Galloway's Custodian

Galloway's argument in Part II that MAF failed to plead receipt by the custodian is meritless. Each request, on its face, states that it was sent to "Nicole Galloway, Missouri State Auditor, **c/o Mark Henley, Custodian of Records**" at the address moaudit@auditor.mo.gov. *See* Petition Exs. A-C.

If necessary, MAF would simply amend its Petition to also state that it served all three requests on Mr. Henley at that email address because Galloway's website directed (and still directs) Sunshine requests to him as Custodian of Records at that email address. MAF would further plead that Galloway's custodian in fact received each request.

F. Galloway Cannot Avoid Liability with a Boilerplate "Three-Day Letter"

Galloway's argument that the Petition fails to state a claim because it states that Galloway "acted" within three days is also meritless. Mot. at 8-9. A body is not immune

from suit when it sends a boilerplate letter in three days. *See, e.g.*, *N. Kan. City Hosp.*, 984 S.W.2d at 115 (body must produce records though it "acted" by sending a letter).

Galloway refused to produce records for *months* after MAF's requests, offering instead promises not of production but of "updates[] on the status of your request" within 30 or 60 days. Petition ¶¶ 25-35, 47-54. If necessary, MAF proffers that it would amend its Petition to state that Galloway produced more than 99.8% of all records she has produced in the three months *after* MAF filed suit.

III. The Way Forward: A Scheduling Order and a Bench Trial

A motion to dismiss cannot resolve MAF's claims, as they challenge the processes that Galloway has used to find responsive records and the decisions she has made to close them. This is information that Galloway possesses and that MAF does not. Discovery targeted to these questions, as well as a *Vaughn* index, will be necessary.

MAF will request the Court to issue a Scheduling Order to place this matter on course for a one-day bench trial sometime in the spring of 2018. This should allow ample time for the parties to complete discovery, frame the issues, and prepare stipulations of fact. For now, the Court should deny Galloway's Motion to Dismiss and order discovery to proceed.

Conclusion

MAF respectfully requests that the Court deny Galloway's Motion to Dismiss and order discovery to proceed.

Respectfully submitted this 26th day of October, 2017.

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Certificate of Service

I hereby certify that on October 26, 2017, I caused a true and correct copy of the foregoing to be served on Defendant Nicole Galloway, through counsel below, by the Court's electronic filing system.

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