

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 AMENDED SUGGESTIONS IN OPPOSITION TO
DEFENDANT’S MOTION FOR PROTECTIVE ORDER**

Plaintiff Missouri Alliance for Freedom, Inc. (“MAF”) respectfully submits its amended suggestions in opposition to Defendant Galloway’s Motion for Protective Order. It is now clear that discovery is needed for three reasons. First, Galloway unilaterally narrowed MAF’s Sunshine request so that it conveniently matched “closed records” criteria and only applied to audit papers, leaving 697 records (and perhaps more) out of the initial productions. Second, Galloway is applying an overly broad view of what is closed, and thus in her review, chose to view as “closed” various emails that were not in the audit files but that somehow relate to audits. Third, no Galloway texts will be produced for reasons that are unclear, and no emails supposedly exist for a very long period. MAF’s claims are ripe, and tailored discovery should proceed to probe and roll back Galloway’s explanations for her Sunshine response—most categories of which are now complete.

Factual and Procedural Background

In May, MAF sent Galloway three public records requests. Defendant's Exs. 1, 5, 7. Until MAF filed this lawsuit in July, Galloway had produced only 25 pages of documents in response (excluding documents available on her website). She has closed more than ten thousand pages of records, claiming that this information is confidential under some or all of a number of statutes. Tr. at 9:10-9:13; Galloway Br., ¶ 10. This is a lawsuit to test some of those claims.¹

Galloway now seeks to withhold indefinitely not only those records, but also her process for selecting them and her reasoning for closing them, from discovery under the Missouri Supreme Court Rules, on grounds of ripeness. Galloway Br. at 2.

Argument

Galloway misunderstands MAF's claims—a misunderstanding that leads her to conclude they are unripe. Galloway then overstates the burden of MAF's targeted discovery and ignores its relationship to MAF's ripe claims.

I. MAF's Claims Are Ripe

MAF claims that Galloway has closed records that should be open. Petition ¶¶ 22-24, 40-42, 66-69, 75-78. Those claims ripened as soon as Galloway refused to produce public records; they rely on no future contingency. *See Progress Mo., Inc. v. Mo. Senate*, 494 S.W.3d 1, 5 (Mo. App. 2016).

¹ See Exhibit 1 for a graphical representation of MAF's requests and claims. A transcript of the September 29, 2017 hearing is attached as Exhibit 2.

Separately, MAF claims that Galloway unreasonably delayed her production. Petition ¶¶ 28-31, 34-35, 49-54, 82-84. Those claims ripened when she did not produce the records within three days after receipt of the request. *See Progress Mo.*, 494 S.W.3d at 5; *Pennington*, 235 S.W.3d at 79. Galloway's rolling production does not affect the ripeness of the claim, although it may limit the harm by ending the delay.

Even under Galloway's theory, where MAF cannot sue until Galloway decides she is done producing, MAF's claims are ripe. Galloway has finished producing records in response to MAF's requests for audit records, its request for Galloway's communications, and its requests for Harper's and Nelson's emails from April 27, 2015 to March 31, 2106. Defendant's Exs. 2, 4, 6, 18, 19.² Only MAF's request for Harper's and Nelson's emails from March 31, 2016 to May 2, 2017 remains.

II. The Court Should Allow Discovery Tailored to MAF's Ripe Claims

MAF requests discovery that is tailored to its claims. Rule 56.01 permits a party to obtain discovery "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action." Mo. S. Ct. R. 56.01. Galloway's responses both before and after the filing of this action, and the testimony of Barbara Wood suggest that Galloway has misconstrued MAF's requests and Missouri law so as to: (1) refuse to produce non-closed records; and (2) close records that should be open.

² Although counsel for Galloway sent cover letters for a production (Exhibits 18 and 19) by email to the undersigned on the afternoon of September 27, Galloway sent the actual production by U.S. Postal Service, and the undersigned did not receive it until October 2. The undersigned could not have reviewed the production before the September 29 hearing.

A. Galloway Unreasonably Narrowed MAF's Requests

MAF sought records "relating to" Galloway's audit of the Department of Revenue. This expressly included two subcategories of records: those "relating to" Galloway's **decision to audit** the Department; and records of communication between the Office of the Auditor and **third parties**. Defendant's Ex. 1. MAF also sought records "relating to" Galloway's audit of the Treasurer, expressly including records of communication between the Office of the Auditor and third parties. Defendant's Ex. 5.

Galloway refused to produce almost all of these records, citing §§ 29.070, 29.200.17, 32.057, 610.021(14), and 610.021(17). Defendant's Exs. 2, 4. The testimony of Barbara Wood revealed for the first time that Galloway re-interpreted MAF's requests to seek only documents that auditors had already determined to be closed. Tr. at 13:20-14:4; 15:24-16:16; 21:21-22:5; 27:17-28:1; 53:19-55:2; 57:15-57:24; 58:6-58:12; 65:6-65:20.

To take one example, on May 2, 2017, MAF asked Galloway to produce "all records relating to your audit of the Missouri Department of Revenue." Defendant's Ex. 1. On May 5, 2017, Galloway responded by producing nine pages of records and claiming that "the remaining requested information is confidential under Sections 29.070, 29.200.17, 32.057, 610.021(14), and 610.021(17), RSMo." Defendant's Ex. 2. Wood re-interpreted MAF's request for records "relating to" the audit narrowly, as one for records "relating to the *performance* of the audit." Tr. at 65:6-66:12 (emphasis added).

On August 1, 2017—less than two weeks after MAF filed this action—Galloway revealed that she had withheld hundreds of records “relating to” the audit because they had not met her narrow re-casting of MAF’s request, *i.e.*, “relating to the *performance* of the audit.” To cover this retreat, Galloway claimed that she had not understood that MAF “intended [its] request to be broader than records with the parties related to the conduct of the audit.” Defendant’s Ex. 4. She “went back and did a search for everything that had to do with the Department of Revenue in terms of the audit and produced everything where there was a reference to the Department of Revenue audit.” Tr. at 65:15-65:20. She then produced 697 pages of records that she had previously refused to produce. Defendant’s Ex. 4; Tr. at 65:6-66:12.

Galloway withheld open, responsive records based on a narrow and admittedly incorrect re-casting of MAF’s request. Galloway likely withheld other open, responsive records based on a similar interpretation. Discovery targeted to reveal Galloway’s processes and interpretations is relevant to MAF’s claims.

B. Missouri Law Does Not Protect All Records “Relating To” an Audit

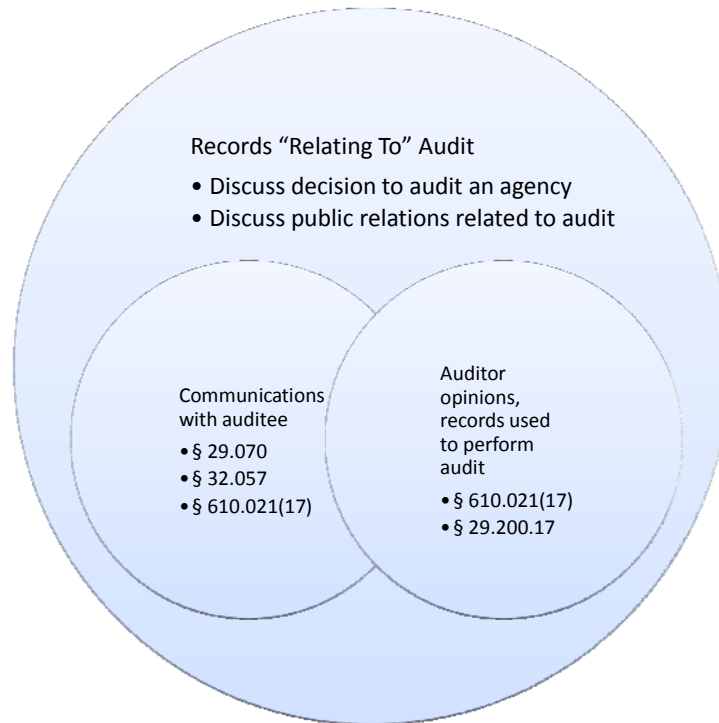
The distinction between records “relating to” an audit and records relating to the performance of an audit lies at the heart of this case. MAF requested all records “relating to” audits; Missouri law closes only a core subset of such records.

Missouri law does close a core of records containing information received from an auditee. The purpose of these confidentiality provisions is to protect the auditee, *not*

the auditor; these protections prohibit the auditor from revealing information received from the audited agency. For example, § 29.070 requires each “examiner appointed by the state auditor” to “not reveal the condition of any office examined by him or any information secured in the course of any examination of any office to anyone except the state auditor.” By its terms it only applies to information received from the auditee. Section 32.057, which protects taxpayer information, would only protect information received from the auditee if the auditee had taxpayer information. Like its federal counterpart, 26 U.S.C. § 6103, this statute protects *the taxpayer*, not the government. *In re United States*, 817 F.3d 953, 965 (6th Cir. 2016).

Missouri law protects “auditor work product”—but “auditor work product” includes only the opinions and impressions of auditors developed in the performance of the audit through review of information from the audited agency. *See* Op. Atty. Gen. No. 209 (Oct. 20, 1975). Section 610.021(17) protects “[c]onfidential or privileged communications between a public governmental body and its auditor, *including* all auditor work product.” The statute defines “auditor work product” as a subset of communications between an auditor and auditee in order to protect the auditee from release of its information and the auditor’s opinion developed from review of that information. Section 29.200.17 states that audit workpapers and related supportive material shall be kept confidential, including “interpretations, advisory opinions, or other information or materials used and relied on *in performing the audit.*” The statute

protects the auditee by prohibiting the auditor from revealing information received from the auditee or opinions that the auditor makes when she performs the audit.



None of these statutes protects communications about the decision to audit an agency,³ the deliberations concerning the pros and cons of auditing an agency, communications about the political implications of an audit, or communications about public relations strategy as it relates to an audit. These communications are responsive to MAF's request and not confidential.

It was in reliance on this distinction that Galloway initially withheld 697 pages of communications between her office and the press "relating to" the audit of the

³ To the extent production implicates anonymity of a whistleblower under § 29.221, RSMo., Galloway should redact the identifying information, not close of the record. *See* § 610.024, RSMo. (requiring public governmental bodies to separate exempt and non-exempt information).

Department of Revenue. *See* Part II.A, *supra*. Yet Wood admitted on cross-examination that when she reviewed Harper’s and Nelson’s emails for production, she withheld and closed *all* records “relating to” audits. Tr. at 57:16-57:22; 66:15-67:5. Galloway also refused to produce records relating to her decision to audit the Department of Revenue. These records relate to audits, but do not lie in the core that is protected by Missouri law. Targeted discovery will permit the parties to litigate these closures without revealing the contents of protected core audit materials. *See* Part III, *infra*.

C. Galloway’s Missing Communications

Galloway has also made troubling claims about the existence—or lack—of her own communications. On May 26, 2017, MAF requested that Galloway produce all correspondence she had sent or received since April 27, 2015. Defendant’s Ex. 7. MAF requested emails, voicemails, voicemail transcripts, and text messages. *Id.* Galloway has finished production on this request. Defendant’s Ex. 18.

Galloway has claimed that, though she has a government-provided phone, no text messages, voicemails, or voicemail transcripts exist. Tr. at 49:2-49:4, 49:15-50:5, 51:19-51:24. Galloway has not explained whether she searched for her texts on the phones of other Auditor employees who also hold (or held) government-provided phones, such as Paul Harper and Doug Nelson. Were those phones searched? Were the records timely preserved? Or is there a blanket claim that all such texts are closed? Galloway won’t say; we only know that for some reason, the “text” issue was handled

by Paul Harper, not Ms. Wood. Galloway also claims that she retains no emails sent or received between April 27, 2015 and September 2016. Tr. at 43:3-44:9, 45:1-45:4.

There may be a lawful explanation for these missing records. Limited, targeted discovery concerning Galloway's communication and record-retention policies and practices will reveal why whole classes of public records do not exist.

III. The Way Forward

The limited evidence already taken in this case reveals that Galloway narrowly construed MAF's requests, and broadly construed Missouri law, to withhold responsive open records from MAF. Other evidence raises concerns about why many records of Galloway's communications do not exist.

Limited discovery can run these concerns to ground. MAF seeks to discover Galloway's justification for withholding the records she has closed. MAF has asked Galloway to produce the records requested and the records withheld. Interrogatories 4-6, 18-19, 23-24, 31-32, 41, 42, 48. MAF does not ask Galloway to review and produce core audit files, and agrees to stay these Interrogatories and corresponding Requests to the extent they call for production of core audit files. MAF does seek all records "relating to" audits that are not core audit files, and asks that the Court order their production. The rest of MAF's existing discovery requests seek information relevant to Galloway's processing of its requests. *See* Interrogatories 1-3, 7-17, 20-22, 25-27, 28-30, 33-35, 38-40, 43-45, 47.

A deposition of both the Office of the Auditor, under Mo. S. Ct. R. 57.03(b)(4), and of Ms. Wood will materially advance the litigation. MAF proposes to examine the deponents about Galloway's record-keeping practices (including Galloway's communications), process for determining whether a record was responsive to MAF's requests, and process for determining whether a record was closed under Missouri law.

These requests should not be burdensome. MAF does not ask Galloway to produce a log of every core audit file she withheld. If she has closed so many other records that justifying the closures is burdensome, the need to litigate her justifications is all the greater. § 610.011, RSMo.

If Galloway believes that individual Interrogatories or Requests are burdensome or unclear, the Rules and process can accommodate those objections without the need for a blanket stay that robs MAF of the tools every litigant uses to prove its case. MAF has tried to confer with Galloway to reorder and limit discovery to ease her claimed burden, but Galloway insists on an across-the-board halt to all discovery. Nothing less will do. This position is unreasonable and Galloway has not begun to justify such a radical departure from the Supreme Court Rules.

Conclusion

MAF respectfully requests that the Court deny Galloway's Motion for Protective Order and permit discovery to proceed under the Rules of Civil Procedure.

Respectfully submitted this 9th day of October, 2017.

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Certificate of Service

I hereby certify that on October 9, 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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