

**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 AMENDED
MOTION FOR A PROTECTIVE ORDER**

In this Sunshine Law case arising from three requests for information covering tens of thousands of documents (which is an ongoing effort without charge to Plaintiff) in which Plaintiff alleges violations of timeliness and completeness, the State Auditor's Office (SAO) objected to pursuing discovery: The matter is not ripe. Document review and production is ongoing and has been ongoing since the dates of Plaintiff's original requests in May 2017. Now, almost two months after an evidentiary hearing on Defendant's Motion for Protective Order, and after more than 10,000 pages of produced records, Plaintiff sent to the SAO a written request to stop all work on all three Sunshine Law requests that are the subject matter of this lawsuit.¹

¹ Plaintiff also filed 13 new records requests.

Based upon this new and unexpected action by Plaintiff, Defendant offers the following in amendment to its Motion for Protective Order (filed August 25, 2017). That motion addressed the extensive and expensive discovery requests filed by Plaintiff demanding, in part, production of all legally confidential and privileged documents that Defendant withheld, as communicated to Plaintiff with accompanying citation to law. The pursuit of such onerous discovery in a case that is still evolving is harassing and unduly burdensome, and the accompanying lack of ripeness of the issues raised by Plaintiff renders such discovery efforts (and resulting disputes) a very expensive waste of time.

Except in brief summary form to provide context for the amended motion, Defendant does not restate the original motion, and incorporates that motion by reference. In support of this amendment to the original motion, Defendant states as follows:

1. The underlying case alleges violations of the Missouri Sunshine Law, Chapter 610 RSMo, concerning three separate requests for information and records sent to Defendant in May 2017, requesting in wholesale fashion several years of records of all communications on every subject from a number of state officials, including attorneys, and audit-related records from two audits.
2. The claimed violations of the Sunshine Law center around an alleged lack of timeliness in producing documents, and the failure to voluntarily provide a summary log of

each individual document in the thousands of records withheld under laws requiring confidentiality or rules establishing privilege.

3. Along with the Petition, Plaintiff served interrogatories and a request for production of documents, and then two additional waves of discovery within the weeks immediately following the filing of the Petition. In large part, this discovery demanded production of all documents withheld--including attorney-client privileged documents, confidential audit files, records of individual tax refunds from the Department of Revenue, and other confidential records explicitly protected by the statutes identified with specific citation in responsive letters to Plaintiff. Plaintiff also demanded a written summary of each document withheld.

4. On August 25, 2017, the SAO filed a motion for a protective order requesting a stay of discovery on the grounds that the grant of access to records and information requested by Plaintiff was ongoing and any suit alleging violations was premature and unripe.

Accordingly, discovery efforts were duplicative, expensive, harassing, and burdensome.

Additionally, the highly regulated confidentiality of the categories of records that Plaintiff is requesting would result in litigating numerous discovery disputes. The motion requested a stay of discovery until December 1, 2017, the date on which Defendant anticipated completion of

the delivery of documents to Plaintiff, such date having been communicated to Plaintiff by letter on August 1, 2017. Ex. 4.

5. On September 29, 2017, this Court held an evidentiary hearing on the motion for a protective order. The matter is presently under advisement.

6. By letter dated November 14, 2017, the Missouri Alliance for Freedom (MAF) asked Defendant to temporarily cease processing all prior requests for records under the Sunshine Law sent by MAF. A true and accurate copy of this letter is attached hereto as Exhibit 20.² This letter is the very first direct communication from Plaintiff about the three Sunshine Law requests that are the subject of the pending case.

7. Whether temporarily or permanently, Plaintiff has, at this point in time, abandoned the Sunshine Law requests that are the subject of the underlying case, and rendered the issues raised by Plaintiff non-redressable:

a. In the underlying case, Plaintiff objects that Defendant did not act in a timely fashion on any of its three Sunshine Law requests from May 2017, although admitting receiving correspondence from Defendant about each request within three business days of receipt. As the evidence in the hearing showed, as of September 29,

² Because this is an amendment to a prior motion, the numbering of the exhibits is continued.

2017, Defendant reviewed approximately 26,000 pages of records and produced approximately 14,000 pages of records to Plaintiff, with an identified 28,000 additional records to review. Tr. 9. Asking Defendant to stop processing Plaintiff's requests effectively renders moot any argument as to timeliness, unless Plaintiff's sole factual point is that a total of 54,000 pages records that include attorney-client privileged communications together with the myriad legally confidential documents in the possession of the State Auditor's Office were not produced within three days.

b. Leaving aside the fact that Plaintiff's requests were for entire categories of documents that were vague and nonspecific (all records "related to" audits; all communications of all kinds for several years), arguing that documents were improperly withheld before the document production is complete is premature at the time of filing of the case and at the time of the hearing on the motion for protective order. Asking now that all efforts on all three requests be halted only underscores the ongoing nature of the records requests and, accordingly, lack of ripeness as to any claim that any particular document was not produced.

c. Plaintiff admits, and the language of the pleadings supports, that the underlying lawsuit is about "testing" claims of confidentiality and privilege.³ Without reference to specific documents, Plaintiff is left to argue about categories of documents over which Plaintiff has now requested the cessation of effort. Neither timeliness nor completeness can be argued at this juncture.

From the foregoing, and in light of Plaintiff's intervention and providing new direction in the processing of its Sunshine Law requests, Plaintiff further underscores the lack of justiciability of the underlying case. All three elements of the lack of ripeness are demonstrated in this case: (1) As an ongoing effort which Plaintiff has now requested at least a temporary cessation, the case is not ready for the court to make an accurate determination of the facts. (2) In the face of complaints that all records have not been delivered to Plaintiff, which Plaintiff argued in the hearing is a matter that had reach finality, Plaintiff's ordering of cessation makes it impossible for the Court to resolve a conflict that presently exists. (3) As an unfinished matter, and one which Plaintiff has explicitly left open for further acts, requests, or actions, the Court would be unable to grant specific relief of a conclusive character. *See,*

³ From Plaintiff's Amended Suggestions in Opposition to Defendant's Motion for a Protective Order, Plaintiff states at page 2: "[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.**" Emphasis supplied.

Levinson v. State, 104 S.W.3d 409, 411-412 (Mo. banc 2003) (a controversy is ripe when facts are stipulated and conclusive relief can be granted).

Accordingly, Defendant amends its request of this Court as follows: Defendant's request that discovery be stayed until December 1, 2017 is revised to request that all discovery in this case be stayed indefinitely.

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 on November 28, 2017 to:

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