

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 MOTION FOR TRIAL DATE, SCHEDULING ORDER,
AND TO OPEN DISCOVERY**

Pursuant to Mo. S. Ct. R. 63.02 and Local Rule 36.1, Plaintiff Missouri Alliance for Freedom, Inc. (“MAF”) respectfully moves the Court to set a May 2018 date for a bench trial, issue an associated Scheduling Order, and to open discovery.

Introduction

At the heart of this case lie triable disputes of fact: has Galloway closed records that should be open? Now there are many disputes, because she has closed thousands of records and refuses to produce a log giving even general information about them. Whether she produces a log or not, the lawfulness of closing those records, her state of mind in closing them, and the unreasonable delay of her production will be issues for trial. Galloway claims that her decision to withhold a document is unreviewable, but Missouri law places the authority and responsibility to review such closures on the Court. MAF

respectfully requests that the Court place this matter on its trial docket for May 2018, enter an associated Scheduling Order, and open discovery.¹

Factual and Procedural Background

On May 2, May 8, and May 26, 2017, MAF sent Galloway requests for public records. When Galloway unreasonably delayed her production and refused to produce open records, MAF sought relief from the Court. MAF filed its Petition on July 17, 2017 and served Galloway on July 21.

In the six months that followed, Galloway has filed three separate, yet largely duplicative, dispositive motions. On August 25, she filed a motion to dismiss. On October 19, she filed another motion to dismiss. On October 27, the parties submitted this motion to the court. And on November 29, though she has produced no discovery in this case, she filed a motion for summary judgment, complete with proposed undisputed facts.

She has also filed duplicative motions to stay discovery. On August 25, she filed a motion for protective order. She presented evidence on this motion at a hearing on September 29, and the Court took the motion under advisement.² On November 28, she filed another motion to stay discovery indefinitely.

¹ MAF has attached a Form 2 as Exhibit 1. Through this Motion and integrated Suggestions, MAF also responds to Galloway's most recent "Amended" Motion for Protective Order.

² Consistent with Galloway's practice, references to "Tr." are to the transcript of that hearing; except for Ex. 20, references to "Ex." are to exhibits introduced at that hearing.

Galloway's custodian has confirmed that she does not intend to produce any more documents in response to MAF's May 26 request for her own correspondence or the May 8 request for documents relating to her audit of the Missouri Treasurer. *See Tr.* at 58:13-59:12; 71:17-72:6; Ex. 18. She has also confirmed that she does not intend to produce any additional documents in response to MAF's May 2 request for records concerning her decision to audit the Department of Revenue. Ex. 2. In response to MAF's May 5 request for the communications of Harper and Nelson, the Auditor has confirmed that she does not intend to produce any additional communications from Harper for the period April 27, 2015 to June 31, 2016 or any additional communications to or from Nelson from April 27, 2015 to May 2, 2017. Affidavit of Edward D. Greim (December 8, 2017), Ex. A.

On December 4, the undersigned sent counsel for Galloway a letter suggesting that the parties confer on possible trial dates in May 2018. Counsel for Galloway responded that "if we proceed with these very general and voluminous records requests, I cannot see us getting to a trial date at any time in 2018, much less in just a few months." Greim Affidavit, Ex. B.

Argument and Authorities

I. The Factual Issues for Trial

At the heart of this case lie triable disputes of fact: has Galloway closed records that should be open? Galloway does not contend that she has produced every

document that MAF has requested. On the contrary, she has presented evidence that she has withheld thousands of such documents, claiming that they are collectively exempt from production under as many as nine different statutory provisions. *E.g.*, Tr. at 8:25- 9:13; Ex. 19.

Galloway does not have the final say on whether she has lawfully closed a record. Missouri law assigns the authority and responsibility to review Galloway's decision to the Court. "Any aggrieved person, taxpayer to, or citizen of, this state, or the attorney general or prosecuting attorney, may seek judicial enforcement of the requirements of sections 610.010 to 610.026." § 610.027(1), RSMo; *see* § 610.030, RSMo (authorizing injunctive relief to enforce Chapter 610). Unchecked deference to an elected public official's decision to withhold a public record would strip the Sunshine Law of its purpose and render the enforcement provisions of the statute null. *See Groth v. Pence*, 67 N.E.3d 1104, 1115 (Ind. Ct. App. 2017) ("We reject the Governor's assertion that his 'own determinations' regarding whether to disclose public records are not subject to judicial review.").

In this case, the Court must exercise its authority and responsibility to determine whether Galloway has a lawful basis to close the records she has refused to produce. The Court must determine what records have been closed and then evaluate each record to determine whether it falls within the exemption claimed for that record. §§ 610.021; 610.023(4). The Court must further determine whether Galloway's delay in

producing the records—more than nine months for some—was reasonable. *Id.* § 610.023(3). Lastly, for each record that Galloway has failed to produce or unreasonably delayed, the Court must determine whether Galloway knowingly or purposely violated the Sunshine Law. §§ 610.027(3); 610.027(4), RSMo. Each determination will rely on triable issues of fact.

MAF filed its Petition seeking resolution of these issues in July. In the six months since, Galloway has filed a series of duplicative motions designed to resist factual development in the case. She has sought not one but two motions for a protective order. She has filed two motions to dismiss and, most recently, a motion for summary judgment. In this last, she attached a purported “Statement of Uncontroverted Material Facts,” even though she has resisted and continues to resist discovery.

Through her refusal to permit factual development, Galloway has increased the burden on the Court. Galloway has refused to produce a log of the documents she has withheld. Missouri law requires such a log. § 610.023(4), RSMo. Such logs, often called *Vaughn* indices, assist the requestor and the Court in testing the lawfulness of an agency’s claimed exemption: “The *Vaughn* court recognized the problems associated with FOIA requests for claimed-exempt documentation, including the requesting party’s inability to advocate its position in light of its lack of knowledge and the court’s difficulty reviewing massive documentation. *Missouri Coal. for Env’t Found. v. U.S. Army Corps of Engineers*, 542 F.3d 1204, 1209 (8th Cir. 2008); see *Vaughn v. Rosen*, 484 F.2d 820,

826 (D.C. Cir. 1973). Had she produced a *Vaughn* index here, the parties may have been able to limit the scope of the dispute and present only the truly disputed documents to the Court for inspection. Instead, she has left the Court to review every document *in camera*.

Galloway justifies her refusal to permit factual development by claiming that the dispute is not “ripe.” Amended Mot. for Prot. Ord. at 5.; Suggestions in Support of Motion for Summary Judgment at 2-4. This is incorrect. As MAF has previously argued, its claims ripened at the moment Galloway closed each record. *See* Plaintiffs Amended Suggestions in Opp. to Mot. for Prot. Ord. at 2-3. Regardless, Galloway has confirmed that she has no intent to produce any additional records in response to MAF’s May 26 request, its May 8 request, or the portion of its May 2 request concerning the Department of Revenue. *See* Tr. at 58:13-59:12; 71:17-72:6; Ex. 2; Ex. 18. Even under Galloway’s theory, her decision to close records relating to those requests is “ripe.” The issues of delay and Galloway’s state of mind are similarly ripe.

Galloway has also recently argued that MAF has “abandoned” its requests, rendering them non-justiciable. Amended Mot. for Prot. Ord. at 4. Contrary to Galloway’s representation to the Court, MAF has not “abandoned” its May requests, nor has it asked Galloway to cease producing the documents it requested. On November 14, 2017, MAF asked Galloway to produce certain records relating to her use of a State-provided cellphone—a request prompted, in part, by her refusal, apparently

on advice of counsel, to produce text message records in response to MAF's May 26 requests. *See* Tr. at 49:2-53:16. In order to assist Galloway in prioritizing MAF's requests, it asked her to "Please process this request first, ahead of any prior MAF request." Ex. 20.³ MAF did not even ask Galloway to *stop* processing its May 2 request, much less "abandon" it. That Galloway has so tortured MAF's statement in service of motions⁴ seeking the same relief as those that have already been briefed, argued, and submitted is itself evidence of purposeful and unreasonable delay.

Regardless, even if MAF had asked Galloway to cease the work that she purported to be doing on its May 2 request—which it emphatically did not—that would have no impact on the Court's authority and responsibility to determine whether she lawfully withheld the records she already determined not to produce. No reasonable official could interpret MAF's November request as conceding the lawfulness of Galloway's past withholding of responsive documents she had already reviewed and deliberately closed.

MAF has requested records, and Galloway has closed them. The parties have drawn the general outline of a dispute involving triable facts. MAF respectfully asks the Court to set the case on a course for trial.

³ MAF notes that Galloway attached "Ex. 20" to her Amended Motion without an authenticating affidavit.

⁴ Or, perhaps, for purposes of issuing a press release. Jack Suntrup, *GOP-aligned group's Sunshine Law offensive meant to 'intimidate,' 'obstruct,' Missouri auditor says*, St. Louis Post-Dispatch (Nov. 30, 2017), http://www.stltoday.com/news/local/govt-and-politics/gop-group-s-sunshine-law-offensive-meant-to-intimidate-obstruct/article_b03482d4-06e0-5299-9e71-b20b81a2537c.html

II. The Limited Discovery Sought

This Court cannot do what the statute requires—determine whether a violation occurred and to assess an appropriate penalty—without more information; information that is available only through discovery. Evidence of delay and unlawful closure, including evidence regarding the processing of MAF’s requests, the decisionmaking regarding whether a record should be produced or withheld, and any attempt to withhold open records, is relevant to MAF’s claim that the Auditor purposely violated the Sunshine Law. The only way to resolve this lawsuit is to collect this relevant evidence.

Limited discovery can run these concerns to ground. In order to efficiently resolve this case, MAF proposes to depose the Office of the Auditor, under Mo. S. Ct. R. 57.03(b)(4), and of Ms. Barbara Wood regarding Galloway’s record-keeping practices, the processes for determining whether a record was responsive to MAF’s requests, and the process for determining whether a record was closed under Missouri law.

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.

MAF has requested, and continues to seek, a log identifying the documents that are responsive to MAF's requests but were withheld, accompanied by a statutory justification for closure that is specific to each document. Missouri law requires the custodian of records to provide a written statement of the grounds for denying access to a public record, including a citation to the specific provision of the law justifying closure. § 610.023(4), RSMo. Galloway's current practice of citing an extended series of statutes as blanket justification for closing tens of thousands of documents fails to satisfy § 610.023(4).

The log, often referred to as a *Vaughn* log or index, helps to alleviate the obvious problem that "the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure." *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973). "Given more adequate, or rather less conclusory, justification in the Government's legal claims, and more specificity by separating and indexing the assertedly exempt documents themselves, a more adequate adversary testing will be produced." *Id.* at 828. Logs like that which MAF requests are common in state law public records and federal FOIA jurisprudence, as they allow for the requesting party and the court to efficiently evaluate the propriety

of the government's decision to withhold documents. *See Missouri Coal. For Env't Found. v. U.S. Army Corps of Engineers*, 542 F.3d 1204, 1209 (8th Cir. 2008).

Contrary to the Auditor's contention, it is not burdensome for Galloway to produce such a log or index justifying why responsive documents were closed, as the closing of any record should have been justified before the record was withheld. The production of such a log would merely require a written memorialization of the determination that the Auditor or Ms. Wood or Mr. Harper, or whoever it was that decided which documents were to be closed, already made days, weeks, or months ago.

Further, as MAF stated in its Amended Suggestions in Opposition to the Motion for Protective Order, it *does not seek production of or a log concerning core audit files: communications with the audited agency or records generated by the line auditors during the performance of the audit.*

A log of this kind is likely the only way that MAF's over-withholding claim can be evaluated. Absent such a log, this litigation will continue along its current collision course that will ultimately culminate in an *in camera* review by the Court of tens of thousands of documents, a laborious undertaking that can likely be avoided if the Auditor produces a log with sufficient information to allow MAF and the Court to determine if the documents were properly closed.

III. The Proposed Schedule

Though the parties have drawn the general outline of a dispute, the contours remain to be filled. MAF respectfully requests a trial date in late May 2018, with dispositive motions due 50 days before trial, responses in 30 days, and replies, witness lists, and exhibit lists due seven days thereafter. MAF respectfully requests that the Court open discovery with completion planned in early April 2018.

Conclusion

MAF respectfully requests that the Court set a trial date, issue an associated Scheduling Order, and open discovery.

Respectfully submitted this 8th day of December, 2017.

GRAVES GARRETT, LLC



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Certificate of Service

I hereby certify that on December 8, 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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