

**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 MOTION TO DISMISS OR, ALTERNATIVELY  
MOTION FOR A PROTECTIVE ORDER**

Pursuant to Rule 55.27(a)(6) Mo. R. Civ. Proc., Defendant moves this Court to dismiss Plaintiff's Petition for failure to state a claim upon which relief may be granted. For the reasons stated below, Plaintiff's claim is premature and not ripe for adjudication. Accordingly, Plaintiff's claims cannot be supported because Plaintiff's allegations rest upon a changing state of facts. The appropriate action for a court to take on a prematurely filed case is a dismissal without prejudice. *See, Reeves v. Kander*, 462 S.W.3d 853, 857 (Mo. App. W.D. 2015); *Wedgewood Square vs. Lincoln Land Title Co.*, 217 S.W.3d 308, 311-312 (Mo. App. S.D. 2007).

Alternatively, and pursuant to Rule 56.01(c), Mo. R. Civ. Proc., Defendant moves this Court to enter a protective order with respect to all discovery matters in the pending case. Plaintiff has prematurely filed a case charging violations of the Sunshine Law in a petition that is replete with allegations of failure to produce thousands of voluminous records that Plaintiff has

either received already, is currently receiving, or is soon to receive. Plaintiff is propounding multiple sets of discovery requests based on these premature allegations, demanding the records anew and seeking individualize summaries of each record produced and excluded from production--demands which are themselves very detailed, broad, and time consuming, all resulting in undue burden and expense to Defendant in a case that is not yet ripe for resolution. Accordingly, Defendant requests this Court enter a protective order suspending all discovery in the underlying cause until a date-certain.

In support of this motion, Defendant states as follows:

1. Plaintiff sent three requests for records in May, 2017, which sought information requiring the review of tens of thousands of pages of records. Wood Affidavit, ¶11.

(a) Plaintiff's May 2, 2017 request, in addition to demanding generally all documents of any kind "related to" a specified audit, asked for all records of communication from two office attorneys, one from April 27, 2015 to present and the other from any time whatsoever. Defendant's Exhibit 1.

(b) Plaintiff's May 8, 2017 request (in addition to all audit paperwork on a specific audit) sought all internal and external communications "related to" an aspect of the audit between or among the Auditor and three officials who serve in whole or in part as her attorneys.<sup>1</sup> Defendant's Exhibit 5; Wood Affidavit, ¶11.

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<sup>1</sup> Paul Harper is the General Counsel. Michael Moorefield is the Chief of Staff and Counsel. Douglas Nelson is the Senior Advisor and who also serves as legal counsel.

(c) Plaintiff's May 26, 2017 request sought all records of communication sent to or by the Auditor for her entire term of office (over a two-year period). Defendant's Exhibit 7.

2. Within three business days of receipt of each letter by the State Auditor's Office (SAO), Plaintiff was sent a letter in response, providing documents identified (and web links to relevant published documents) and by informing Plaintiff that further review of their request was underway. Defendant's Exhibits 2, 6, 8. Thereafter, Plaintiff was provided with update letters with updated time estimates as Defendant worked through the requests. Defendant's Exhibits 2, 3, 4, 8, 9.

3. As of August 11, 2017, Defendant has collected and reviewed more than 15,000 pages of records and produced to Plaintiff over 3,500 pages of records. Wood Affidavit, ¶10;

4. Defendant has identified an additional 50,000 potentially responsive records yet to review. Wood Affidavit, ¶10.

5. As of August 11, 2017, Defendant's Senior Counsel who is reviewing potentially responsive records has spent an estimated 185 hours working on Plaintiff's requests, not counting computer systems personnel and other administrative staff assistance. Wood Affidavit, ¶9.

6. Defendant was served with Plaintiff's Petition on July 21, 2017.

7. Plaintiff's Petition is replete with allegations of denials of access to records that Plaintiff has either received already (several thousand), is currently receiving, or will soon receive as the SAO continues its collection and review of many tens of thousands of pages of

records collected under Plaintiff's exceedingly broad requests, and as outlined in the timeline proposed by Defendants for review and production. Defendant's Exhibits 2, 3, 4, 8, 9.

8. Plaintiff communicated no objection to or dissatisfaction with the timetables or any of the update letters sent to Plaintiff during the pendency of this search and review, nor was there any other communication from Plaintiff beyond the initial records request. Instead, Plaintiff filed the present action. Wood Affidavit, ¶15.

9. Plaintiff is propounding extensive discovery (three sets since service on July 21, 2017, the last two sets served August 16 and 23 respectively) that includes the same records requested in their Sunshine Law letters. Defendant's Exhibits 10-15. In addition to requesting the documents themselves, Plaintiff is insisting that Defendant draft summaries of each document, including not only content, but how each individual document was chosen and by whom. In accompanying document production requests, Plaintiff requests that these documents be produced.

10. Plaintiff is also requesting in discovery a listing and description of each record excluded. In accompanying document production requests, Plaintiff requests that these documents as well. *See, e.g.*, Defendants Exhibit 14, Interrogatory Nos. 31 and 41, and Defendant's Exhibit 15, Document Production Request Nos. 19 and 23. The descriptions alone will have to address tens of thousands of documents and, accordingly, result in tens of thousands of individual document summaries.

11. Responses to these extensive discovery requests will have to be repeatedly updated as documents are collected for transmittal.

12. Plaintiff's underlying case is not ripe for resolution; the many very broad and nonspecific requests require significant effort, time, and expense to Defendant, and the accompanying discovery requests multiply this effect resulting in an undue and oppressive burden to Defendant.

13. Filing the pending case in the middle of the processing of Plaintiff's request for records is also premature in that:

(a) Plaintiff's claims for denial of records diminish with each delivery of documents;

(b) Plaintiff cannot yet ascertain or reasonably allege that they were unlawfully denied access to any record;

(c) Any complaint about the amount of time the document production is taking can only be evaluated after considering the volume of work Defendant has undertaken to locate and review such documents--a process that is still occurring.

14. Additionally, by pursuing such extensive discovery in a case not ripe for resolution, Plaintiff is using civil discovery tools to obtain records protected by law and not obtainable under the Sunshine Law. See §§29.070, 29.200, 29.221, 32.057, 610.021(1), 610.021(14), 610.021(17), 610.021(21), and 17 U.S.C. §102. Records unavailable under the Sunshine Law cannot form the basis for a civil case premised on failure to provide access to those same records.

15. The trial court has broad discretion in administering the rules of discovery. *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. banc 2002). "A protective order

should issue if annoyance, oppression, and undue burden and expense outweigh the need for discovery." *Id.* (citing Rule 56.01(c)).

WHEREFORE, Defendant prays this Court enter an order dismissing Plaintiff's case without prejudice.

Alternatively, Defendant prays that this Court enter an order stopping all discovery in this case until such time as Defendant has had a reasonable time to produce records requested by Plaintiff's demands for access to records shown in Defendant's Exhibits 1, 5, and 7, and that discovery may be resumed after December 1, 2017. Specifically, Defendant prays that this Court order that:

1. All discovery in this case is suspended until further order of this Court.
2. Plaintiff and Defendant are relieved of any duty to respond to discovery propounded up through the date of this Order.
3. The parties may propound new discovery after such time as this Court lifts this suspension pursuant to a joint motion made by the parties.
4. This cause shall be set for status hearing on December 1, 2017 at 9:00 a.m. in Division I, at which time this Court will enter an order lifting this suspension (if not already lifted by agreement), and enter any further orders necessary.

Respectfully submitted,

/s/ Joel E. Anderson  
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*Attorney for Defendant Galloway*

**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 25 day of August, 2017 to:

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//s// Joel E. Anderson  
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