

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 MOTION FOR PROTECTIVE ORDER**

Plaintiff Missouri Alliance for Freedom, Inc. (“MAF”) respectfully submits its suggestions in opposition to Defendant Galloway’s Motion for Protective Order, to be heard on September 29, 2017 at 1:00 p.m.¹

Factual and Procedural Background

In May, MAF sent Galloway three public records requests. Wood Affidavit, 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 tens of thousands of records, claiming that this information is confidential under some or all of a number of statutes, including: §§ 29.070, 29.200.17, 29.221, 32.057, 610.021(1),

¹ As part of the same filing, Galloway also moved to dismiss this action. Galloway has not called up the motion to dismiss for hearing. *See* Order (Sept. 1, 2017). The motion to dismiss is not before the Court.

610.021(13), 610.021(14), 610.021(17), and 610.021(21), RSMo., and 17 U.S.C. § 102. Galloway Br., ¶ 10. This is a lawsuit to test those claims.

Galloway now seeks to indefinitely withhold 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. Galloway Br. at 2. She argues that MAF's claim is unripe. *Id.*

Argument

Galloway's motion rests on two misunderstandings. First, she misunderstands MAF's claims—a misunderstanding that leads her to conclude they are unripe. Second, she misunderstands the burden of MAF's targeted discovery and its relationship to MAF's ripe claims.

I. MAF's Claims Are Ripe

Galloway argues that MAF's claim is unripe and that its "claims for denial of records diminish with each delivery of documents." Br. at 2, 5, ¶ 13. Galloway misunderstands the nature of MAF's claims and conflates MAF's two different theories.

First, 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 the records; they rely on no future contingency. *See Progress Mo., Inc. v. Mo. Senate*, 494 S.W.3d 1, 5 (Mo. App. 2016); *see also Pennington v. Dobbs*, 235 S.W.3d 77, 79 (Mo. App. 2007) (elements of Sunshine Law claim); *cf.* § 610.027.2, RSMo.; *Laut v. City of*

Arnold, 417 S.W.3d 315, 320-21 (Mo. App. 2013) (“[I]t was the City’s burden under Section 610.027.2 to demonstrate compliance with the Sunshine Law once appellants showed that the City was subject to the Sunshine Law and had closed records.”).

Separately, MAF also 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, if it continues, does not affect the ripeness of the claim now, although it may limit the harm by ending the delay. Galloway is still liable for the interim unreasonable delay.

MAF has adequately pled ripe claims of overbroad closure of public records and delay in production.

II. The Court Should Not Stay 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 suggest that she has closed records that should be open, misconstrued MAF’s requests in a way that enabled her to refuse to produce records, and relied on deficient protocols to locate responsive records.

MAF has reason to believe that Galloway has closed records that should be open. For example, on May 26, 2017, MAF asked Galloway to produce all records of

communication that she has sent or received while serving as Auditor. Wood Affidavit, Ex. 7. Galloway has been serving as Auditor since April 27, 2015. She produced nothing except what was published on her website until after MAF filed this action, 51 days later. Petition, ¶¶ 46-54.

In the additional two months since MAF served her with its Petition, Galloway has produced only 173 pages of communications covering the period April 27, 2015 to May 31, 2016—none of which were emails from her own account, text messages from her official phone, or interoffice memoranda. She claims that every other communication she sent or received for more than a year is closed under one or more of five sections of the Missouri code. These claims are implausible.

Galloway's responses also indicate that she has misconstrued MAF's requests in a way that has resulted in refusal to produce responsive records. For example, on May 2, 2017, MAF asked Galloway to produce "[a]ll records of communication between or among the Office of the Auditor (including any agent thereof) and any other party or parties relating to the audit of the timeliness of tax refund issuance." Wood Affidavit, 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." *Id.* Ex. 2. On August 1, 2017—after MAF filed this action—Galloway supplemented her response, claiming that she did not understand that MAF "intended [its] request to be broader than records

with the parties related to the conduct of the audit.” *Id.* Ex. 4. She then produced 697 pages of communications between her office and other parties that she had previously refused to produce.

Galloway’s responses also indicate serious deficiencies in the process that she has used to determine whether documents are responsive. For example, as part of its May 2, 2017 request, MAF asked Galloway to produce “all records of communications to or from Douglas Nelson from April 27, 2015 to the present.” *Id.* Ex. 1. Galloway produced no communications to or from Nelson before MAF filed this action. Galloway *still* has produced no communications to or from Nelson. Instead, she has produced two different batches of emails to or from “Nelson, Vicki” and “Elfrink, Nelson.” Instead of searching her office database for emails to or from the account belonging to Douglas Nelson, Galloway has increased the burden on her own organization by producing non-responsive emails.

MAF’s discovery requests seek information relevant to Galloway’s processing of its requests. For example, MAF asks for her policies concerning the Sunshine Law, identities of those who responded to its requests, their correspondence concerning its requests, and her processes for responding to other requests under the Sunshine Law. *See* Interrogatories 7-17, 22, 30, 40. MAF also asks her to identify and describe the process by which she identified the records she produced and the records she withheld from its requests. *See* Interrogatories 20-21, 28-29, 38-39. It also asks her to quantify how

many records she has produced and withheld. *See* Interrogatories 25-27, 33-35, 43-45, 47. It also asks her to identify the accounts that she, Harper, and Nelson have used to communicate. Interrogatories 1-3. These requests are all targeted at determining whether Galloway has employed a process that is likely to produce the records that are responsive to MAF's request. They are not burdensome.

MAF also seeks discovery on Galloway's justification for withholding the records she has closed. It asks whether she contends that all records withheld are closed under one or more statutes. *See* Interrogatory 36-37, 46. It further asks her to produce the records requested and the records withheld. Interrogatories 4-6, 18-19, 23-24, 31-32, 41, 42, 48. These requests are tailored to discover Galloway's justification for closing the documents that she has closed. Without this information, MAF—and the Court—will be unable to determine whether she has lawfully closed them. These requests should not be burdensome: if Galloway has closed these records, she has presumably already determined the basis for the closure for each record. If she has closed so many 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 in the ordinary course under the Rules of Civil Procedure.

Respectfully submitted this 28th day of September, 2017.

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Certificate of Service

I hereby certify that on September 28, 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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