

COMPLAINT
BEFORE
THE ATTORNEY GENERAL OF MISSOURI

Summary of Complaint

Nicole Galloway, the Missouri State Auditor, has unlawfully withheld public records from her State-provided cell phone.

Facts

On May 26, 2017, the Missouri Alliance for Freedom, Inc. (“MAF”) sent a public records request to Missouri State Auditor Nicole Galloway. Ex. A. The request sought “all records of communication you have sent or received while serving as Auditor.” *Id.* MAF defined “records” to include documents; notes; correspondence; memoranda; letters; email; faxes; spreadsheets; databases; telephone call logs; recordings or notes of telephone conversations; recordings or notes of voicemails; recordings, notes, minutes, or agenda of meetings; text messages; instant messages; and calendar entries. *Id.*

In written responses to MAF, Galloway stated that she closed all of the text messages, instant messages, call logs, or any other records relating to her State-provided cell phone.

On June 1, she unilaterally delayed her date of production for 30 days. Ex. B. On June 30, she unilaterally delayed her date of production for another 60 days. Ex. C. On July 17, MAF filed suit in Cole County Circuit Court to enjoin Galloway to produce records. On August 29, Galloway produced 173 pages of hard copy correspondence with dates between April 27, 2015, and May 31, 2016. Ex. D. She unilaterally delayed her remaining response for another 30 days. *Id.*

On September 27, 2017, Galloway provided physical correspondence dated April 15, 2015 to May 26, 2017 and email correspondence dated September 14, 2016 to May 19, 2017. Ex. E. She closed all remaining responsive records: “Additional responsive documents during these dates are closed under sections 29.070, 29.200.17, 29.221, 610.021(13), 610.021(14), 610.021(17), and 610.021(21), RSMo., and 17 U.S.C.A. Section 102.” *Id.*

In sworn testimony just two days later, Galloway's story seemed to change: her custodian testified that the text messages did not exist. When asked why Galloway produced no text messages from April 27, 2015 to May 31, 2016, the custodian stated that "There were no text messages." Ex. F at 49:15-49:20. When asked why Galloway produced no text messages in her second and final production, Galloway's custodian testified that "They might have been responsive but they would have had to have been looked at, but we did not have any." *Id.* at 50:9-50:11. When pressed, Galloway's custodian stated again that Galloway has no text messages: "For that time period we do not have any that exist." *Id.* at 51:1-52:7.

MAF has reason to doubt the custodian's assertion that Galloway retains no text messages from her more than two years in office, because the custodian admitted that she never searched Galloway's State-provided phone in response to MAF's requests. *Id.* at 50:12-5:16. When asked who had searched Galloway's phone, Galloway's custodian avoided the question: "I consulted with our general counsel." *Id.* at 50:19-50:22. She did not know whether the general counsel, Paul Harper, had searched Galloway's State-provided phone. *Id.* at 50:23-50:25. When asked what she had discussed with Harper, the custodian refused to answer, citing attorney-client privilege. *Id.* at 52:12-52:20.

Even if one credits both Galloway's September 27 response and the September 29 testimony of her custodian, the evidence shows that Galloway initially withheld responsive records under a broad claim of privilege based on one or more of seven different statutes and then later—at some point after MAF filed suit in Cole County—Galloway claimed that those records had ceased to exist.

In an attempt to uncover the reason for this change of position, on November 14 MAF submitted another public records request. Ex. G. In this request, MAF sought a current forensic image of Galloway's State-provided phone, all backup files of that phone, and all records relating to preservation, destruction, deletion, or loss of data on her phone, among other requests. *Id.* On December 8, Galloway responded that she had no current forensic image or backup files and refused to answer MAF's request for records concerning the destruction, deletion, or loss of data on Galloway's phone. Ex. H.

Allegation

Section 610.023, RSMo., requires a public governmental body to make its public records available for copying and inspection. Because she is a governmental entity created by the Constitution, the Missouri State Auditor is a public governmental body. § 610.010(4), RSMo. Text messages and other information retained on the Auditor's State-provided

cell phone are “public records” because they are electronic records retained by or of a public governmental body. § 610.010(6), RSMo.

Galloway initially withheld all records under a blanket claim of privilege. MAF submits that it is implausible that each and every cellular phone communication that Galloway had for more than two years may be lawfully closed. By closing records that should be open, Galloway violated § 610.023(1), RSMo.

MAF has been unable to test Galloway’s claims of closure. Though MAF asked, Galloway refused and continues to refuse to provide a log generally describing each record withheld and her justification for withholding it. Missouri law requires such logs. § 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. *Mo. 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). Because Galloway has refused to produce a log, she has denied MAF the opportunity to challenge her blanket claim of privilege. By refusing to provide a log, she has violated § 610.023(4), RSMo.

Missouri law also requires that Galloway retain her cell phone related records. Galloway is an “agency” because the Office of State Auditor is a “department, office, commission, board or other unite of state government . . . created for any purpose under the authorities of or by the state of Missouri.” § 109.210. RSMo. “No record shall be destroyed or otherwise disposed of by any agency unless it is determined by the commission or board that the record has no further administrative, legal, fiscal, research or historical value.” § 109.260, RSMo. The Commission does not permit destruction of elected officials’ correspondence. See Agency Records Disposition Schedule, Series 21530, General Correspondence—Elected Officials and Department Directors, available at <https://www.sos.mo.gov/CMSImages/RecordsManagement/schedules/GRS/Admin.pdf>. If Galloway destroyed records of her text messages, she violated § 109.260, RSMo. If she did so after MAF served its summons of its Petition in Cole County on July 21, as her response and custodian’s testimony suggest, she also violated § 610.027(1), RSMo.

The State of Missouri and its citizens have an interest in open and transparent government. See § 610.011. Missouri’s citizens deserve answers on how their tax funds have been used. What steps did Galloway’s custodian take to respond to MAF’s

requests, and why did she not search Galloway's State-provided phone for responsive records? Why did she initially refuse to produce all of her text messages over a two-year period? If they existed, why did she close them and was that closure lawful? If they did not exist, when did they cease to exist? Did Galloway violate Missouri's record retention laws or public records laws by destroying them?

MAF calls on the Attorney General to investigate and take appropriate legal action against Auditor Galloway for her repeated and brazen refusals to produce text messages from her State-provided and taxpayer-funded cellular phone.