**IN THE SUPREME COURT OF MISSOURI**

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**No. SC98619**

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**Elad Gross,**
**Appellant,**

**v.**

**Michael Parson, et al.**
**Respondents.**

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**Appeal from the 19th Judicial Circuit Court of Missouri**
**The Honorable Judge Patricia Joyce Presiding**

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# APPELLANT'S SUBSTITUTE BRIEF

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## JURISDICTIONAL STATEMENT

On October 16, 2018, Appellant Elad Gross filed his Petition in Cole County Circuit Court, alleging that Respondents Governor Michael Parson and Custodian of Records Michelle Hallford violated Appellant's statutory rights to inspect records pursuant to Missouri's Sunshine Law, codified in Missouri Revised Statutes Chapter 610. (LF 2). On April 11, 2019, Respondents filed their Motion for a Judgment on the Pleadings. (LF 19). On July 8, 2019, the Circuit Court granted Respondents' Motion and dismissed Appellant's Petition. (LF 24-25).

Appellant appealed the Circuit Court's Judgment and Order dismissing his claims to the Western District Court of Appeals on August 8, 2019. On May 26, 2020, the Court of Appeals reversed the Circuit Court's Judgment and remanded this case for further proceedings. On November 3, 2020, this Court granted Respondents' Application to Transfer this case to the Supreme Court of Missouri.

## STATEMENT OF FACTS

Appellant is a Missouri citizen seeking records from the Missouri Governor under Missouri's Sunshine Law. (LF 2 at ¶¶ 1, 4, 6; LF 18 at ¶¶ 1, 4, 6). Respondent Michael Parson is the Governor of Missouri, and the Missouri Governor is a public governmental body as defined under RSMo. § 610.010. (LF 2 at ¶¶ 2, 6; LF 18 at ¶¶ 2, 6). Respondent Michelle Hallford is the custodian of records of the Missouri Governor. (LF 2 at ¶ 3; LF 18 at ¶ 3).

On August 18, 2018, Appellant sent Respondent Hallford a Sunshine Request seeking records from Respondent Parson pursuant to Missouri Revised Statutes Chapter 610. (LF 2 at ¶ 10; LF 3; LF 18 at ¶ 10). Appellant sent Respondents his Sunshine Request as part of an investigation into Missouri nonprofit organizations using anonymous political campaign contributions – often referred to as "dark money" – to circumvent Missouri campaign finance laws and influence Missouri government and policy. (LF 2 at ¶ 11; LF 3). In his first Sunshine Request, Appellant asked Respondents to waive all fees for locating and copying the records because his request was made in the public interest "due to its law enforcement purpose and because it will reveal whether specific nonprofit organizations are violating Missouri's consumer protection laws and whether legislation is needed to provide transparency in government for the people of Missouri." (LF 2 at ¶ 12; LF 3; LF 18 at ¶ 12).

After informing Appellant that he would need additional time to respond, Christopher Limbaugh responded to Appellant's first Sunshine Request on September 21, 2018. (LF 2 at ¶¶ 13-14; LF 4; LF 5; LF 18 at ¶¶ 13-14). Mr. Limbaugh wrote that Respondents found 13,659 documents that may be responsive to Appellant's first Sunshine Request. (LF 2 at ¶ 14; LF 5; LF 18 at ¶ 14). Respondents further estimated costs for providing the records at $3,618.40. *Id.* Mr. Limbaugh also wrote that providing the documents would take at least 120 business days. *Id.* Mr. Limbaugh attached an invoice to the September 21, 2018 letter. The invoice included one line for charges: "Research/Processing: 90.46 hours x $40.00/hour $3,618.40". (LF 2 at ¶ 15; LF 5; LF 18 at ¶ 15).

On September 24, 2018, Appellant sent Respondent Hallford and Mr. Limbaugh a letter requesting that Respondents reconsider imposing fees for the requested documents, citing the section of Missouri's Sunshine Law—RSMo. § 610.026.1—providing for waiver or reduction of fees when the request is made in the public interest. (LF 2 at ¶¶ 16, 17; LF 6; LF 18 at ¶¶ 16, 17). Appellant stated that he had no commercial interest in the material requested, informed Respondents that he had spent significant time and resources undertaking his own investigation into dark money corruption in Missouri, and listed several public interests central to his request including: "law enforcement, consumer protection, campaign finance laws, government

transparency, the potential need for legislative reform, and rooting out corruption." (LF 2 at ¶¶ 18, 19; LF 6; LF 18 at ¶¶ 18, 19). Appellant asked that, in the alternative to waiving the fee, Respondents explain why Appellant was being charged $40 per hour when RSMo. § 610.026 calls for record production "using employees of the body that result in the lowest amount of charges for search, research, and duplication time." (LF 2 at ¶ 20; LF 6; LF 18 at ¶ 20). Appellant also asked Respondents to reconsider taking at least 120 business days—more than half a year—to produce the requested records and comply with RSMo. § 610.023.3 requiring Respondents to "give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection." (LF 2 at ¶ 22; LF 6; LF 18 at ¶ 22). Respondents had not provided the requisite detailed explanation for the delay or the earliest time and date the records would be available, instead providing a date by which the records *may* be ready. (LF 2 at ¶¶ 23, 24; LF 5).

On September 24, 2018, Appellant sent a second Sunshine Request to Respondents requesting all records involving Respondents' answer to Appellant's first Sunshine Request. (LF 2 at ¶ 27; LF 9; LF 18 at ¶ 27). Appellant again requested that the fees be waived pursuant to the Sunshine Law, citing the public interest in campaign finance laws, law enforcement, and transparency in government. (LF 2 at ¶ 28; LF 9; LF 18 at ¶ 28). On

October 12, 2018, after receiving no response, Appellant sent Respondent Hallford and Mr. Limbaugh a letter requesting a response to his second Sunshine Request by the close of business on October 12, and Appellant reasserted his request that Respondents reconsider charging Appellant $3,618.40 and imposing a lengthy waiting time for responsive documents to his first Sunshine Request. (LF 2 at ¶¶ 29-31; LF 11; LF 18 at ¶¶ 29-30). On October 12, 2018, Mr. Limbaugh responded to Appellant's second Sunshine Request, attached responsive records, and explicitly waived fees. (LF 2 at ¶ 32; LF 12; LF 18 at ¶ 32). The responsive records came in two sets: Set "A_Redacted" consisted of 17 pages and included two pages with partial redactions, and set "B" consisted of 40 pages. (LF 2 at ¶¶ 33, 34; LF 13; LF 14; LF 18 at ¶¶ 33, 34). None of Respondents' responses to any of Appellant's Sunshine Requests indicated that any pertinent records were closed. (LF 2 at ¶ 35; LF 4; LF 5; LF 10; LF 12; LF 18 at ¶ 35).

Set B included a September 6, 2018 email sent at 10:23 AM by Debbie Goeller with the Office of the Governor to "EmailDiscovery" requesting a search authorized by Mr. Limbaugh. (LF 2 at ¶ 36; LF 14; LF 18 at ¶ 36). The email included an attachment labelled "DA EMAIL SEARCH REQUEST – Elad Gross.docx". *Id.* The emailed request asked the recipient to "[p]lease have responsive records provided as soon as possible." *Id.* Set B included a second September 6, 2018 email sent at 3:03 PM by "EmailDiscovery" in reply

to Debbie Goeller stating that "[t]he requested searches have been completed." (LF 2 at ¶ 37; LF 14; LF 18 at ¶ 37).

Set B also included a September 24, 2018 email from Debbie Goeller to Chris Limbaugh and copying Respondent Hallford, forwarding Appellant's September 24, 2018 letter requesting that the Office of the Missouri Governor reconsider charging Appellant $3,618.40 for records and imposing a waiting period of over half a year or, in the alternative, provide further explanation of the charges. (LF 2 at ¶ 38; LF 14; LF 18 at ¶ 38). In the email, Debbie Goeller asked Chris Limbaugh if she could discuss Appellant's letter with Mr. Limbaugh when Ms. Goeller returned to the office. *Id.* Appellant never received a response to his September 24, 2018 letter. (LF 2 at ¶ 39; LF 14; LF 18 at ¶ 39).

At the time the Petition was filed, only 11 of the 33 employees in the Office of the Missouri Governor received at least $40.00 per hour in compensation. (LF 2 at ¶ 44; LF 7). Respondent Hallford was paid approximately $26 per hour and Ms. Goeller, who appears to have directed the search for documents, received approximately $19 per hour. (LF 2 at ¶ 46; LF 7). During the time Eric Greitens was Governor of Missouri, the Office of the Missouri Governor charged $19 per hour for records when the Office imposed a charge. (LF 2 at ¶ 47; LF 13, p. 6).

During the correspondence with Respondents, Appellant referred the matter to the Missouri Attorney General's Office's Sunshine Complaint Unit. (LF 2 at ¶ 26; LF 8; LF 18 at ¶ 26). The Attorney General at the time was now-Senator Josh Hawley. *Id.* Appellant's initial Sunshine Request to Respondents requested communications between the Office of the Governor and 27 individuals and groups associated with dark money in Missouri since January 9, 2017. (LF 2 at ¶ 11; LF 3). Those individuals and groups included supporters of Senator Hawley's campaign for United States Senate. (LF 2 at ¶ 50; LF 15). As Attorney General, Senator Hawley did not investigate dark money operations in Missouri, including many of the organizations and individuals that were listed in Appellant's first Sunshine Request. (LF 2 at ¶ 51). Respondent Parson supported Senator Hawley is his Senate campaign. (LF 2 at ¶ 52; LF 16). Respondents release of the public records requested by Appellant could have shown violations of Missouri's campaign finance laws and affected public perception of the elected officials involved. (LF 2 at ¶¶ 87-90, 121-22). As a result of Respondents' actions, Appellant has incurred substantial costs. (LF 2 at ¶¶ 53, 75, 82, 92, 101, 108, 115, 123, 132).

Appellant filed his Petition on October 16, 2018. (LF 2). Respondents filed their Motion for a Judgment on the Pleadings on April 11, 2019. (LF 19). Appellant responded on May 20, 2019 (LF 20). The trial court held a hearing on May 21, 2019. Respondents replied on June 14, 2019 (LF 22). The Court

granted Respondents' Motion and dismissed Appellant's case on July 8, 2019 (LF 24-25). Appellant filed an appeal on August 7, 2019. (LF 26). On May 26, 2020, the Court of Appeals reversed the Circuit Court's Judgment and remanded this case for further proceedings. On November 3, 2020, this Court granted Respondents' Application to Transfer this case to the Supreme Court of Missouri.

## POINTS RELIED ON

**I. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 and Missouri case law in that Missouri law provides that Respondents impermissibly charged Appellant attorney's fees as a requirement to access public records requested in Appellant's first Sunshine Request.**

- *White v. City of Ladue*, 422 S.W.3d 439 (Mo. Ct. App. 2013)
- *Swaine v. McCulloch*, No. 15SL-CC03842 (St. Louis County Circuit Court, Jan. 4, 2017)
- *State ex rel. Missouri Local Gov't Ret. Sys. v. Bill*, 935 S.W.2d 659 (Mo. Ct. App. 1996)
- RSMo. § 610.026

**II. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri law provides that Respondents violated the law when they failed to provide Appellant with the earliest time the records requested in his first Sunshine Requested would be available.**

- *Swaine v. McCulloch*, No. 15SL-CC03842 (St. Louis County Circuit Court, Jan. 4, 2017)
- RSMo. § 610.023.3

**III. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri law provides that Respondents violated the law when they failed to provide Appellant with a detailed explanation of why Respondents required at least 120 business days to produce documents requested by Appellant's first Sunshine Request.**

- RSMo. § 610.023.3

**IV. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri law provides that Respondents violated the law when they redacted records requested in Appellant's second Sunshine Request without explanation and without closing any records.**

- *Great Rivers Envtl. Law Ctr. v. City of St. Peters*, 290 S.W.3d 732 (Mo. Ct. App. 2009)
- RSMo. § 610.011.1
- RSMo. § 610.022.5
- RSMo. § 610.021

**V. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri law provides that Respondents have the burden to demonstrate compliance with the Sunshine Law when redacting public records requested by Appellant in his second Sunshine Request.**

- *Wyrick v. Henry*, 2019 WL 5874668 (Mo. Ct. App. Nov. 12, 2019)
- *Spradlin v. City of Fulton*, 982 S.W.2d 255 (Mo. 1998)
- RSMo. § 610.027.2

**VI. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri law provides that Respondents knowingly violated the law when improperly responding to Appellant's first Sunshine Request because Appellant made Respondents aware of the requirements of the law.**

- *Wyrick v. Henry*, 2019 WL 5874668 (Mo. Ct. App. Nov. 12, 2019)
- *Spradlin v. City of Fulton*, 982 S.W.2d 255 (Mo. 1998)
- RSMo. § 610.027.2

**VII. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri law provides that Respondents knowingly violated the law when improperly responding to Appellant's second Sunshine Request because Appellant made Respondents aware of the requirements of the law.**

- *Wyrick v. Henry*, 2019 WL 5874668 (Mo. Ct. App. Nov. 12, 2019)
- *Laut v. City of Arnold*, 491 S.W.3d 191 (Mo. 2016)
- RSMo. § 610.027.3
- RSMo. § 610.027.6

**VIII. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri law provides that Respondents purposely violated the law when improperly responding to Appellant's first Sunshine Request because Appellant made Respondents aware of the requirements of the law, Respondents treated Appellant differently than previous requesters, and Respondents had a motive to keep**

**the requested records hidden from the public.**

- *Wyrick v. Henry*, 2019 WL 5874668 (Mo. Ct. App. Nov. 12, 2019)
- *Laut v. City of Arnold*, 491 S.W.3d 191 (Mo. 2016)
- RSMo. § 610.027.3
- RSMo. § 610.027.6

**IX. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri law provides that Respondents purposely violated the law when improperly responding to Appellant's second Sunshine Request because Appellant made Respondents aware of the requirements of the law, Respondents treated Appellant differently than previous requesters, and Respondents had a motive to keep the requested records hidden from the public.**

- *Laut v. City of Arnold*, 491 S.W.3d 191 (Mo. 2016)
- *Spradlin v. City of Fulton*, 982 S.W.2d 255 (Mo. 1998)
- *Buckner v. Burnett*, 908 S.W.2d 908 (Mo. Ct. App. 1995)
- *Wyrick v. Henry*, 2019 WL 5874668 (Mo. Ct. App. Nov. 12, 2019)

**X. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri statutory and case**

**law, the Missouri Constitution, and the United States Constitution provide that Respondents abused their discretion by acting arbitrarily and capriciously in denying Appellant's request for Respondents to waive or reduce fees associated with his first Sunshine Request.**

- *Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Educ.*, 34 S.W.3d 266 (Mo. Ct. App. 2000)
- *Elliott v. Carnahan*, 916 S.W.2d 239 (Mo. Ct. App. 1995)
- *City of Dardenne Prairie v. Adams Concrete & Masonry, LLC*, 529 S.W.3d 12 (Mo. Ct. App. 2017)
- RSMo. § 610.011

## STANDARD OF REVIEW

All of the points relied on challenge a judgment on the pleadings and therefore all raise issues of law, which are reviewed by this Court de novo without deference to the trial court's ruling. *City of Dardenne Prairie v. Adams Concrete & Masonry, LLC*, 529 S.W.3d 12, 17 (Mo. Ct. App. 2017). On review, the well-pleaded facts asserted by the non-moving party – in this case, Appellant – must be taken as true. *Id.* This Court may affirm a judgment on the pleadings "only where under the conceded facts, a judgment different from that pronounced could not be rendered notwithstanding any evidence which might be produced." *Id.* (citing *Armstrong v. Cape Girardeau Physician Assocs.*, 49 S.W.3d 821, 824 (Mo. Ct. App. 2001)).

## ARGUMENT

### I. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 and Missouri case law in that Missouri law provides that Respondents impermissibly charged Appellant attorney's fees as a requirement to access public records requested in Appellant's first Sunshine Request.

The trial court erred in dismissing Appellant's case because Respondents impermissibly charged Appellant attorney's fees, which are not authorized under Missouri's Sunshine Law.

The Sunshine Law permits government entities to charge "for search, research, and duplication time" when producing copies of public records maintained as paper records on paper not larger than nine by 14 inches. RSMo. § 610.026.1. The Sunshine Law also permits:

> Fees for providing access to public records maintained on computer facilities, recording tapes or disks, videotapes or films, pictures, maps, slides, graphics, illustrations or similar audio or visual items or devices, and for paper copies larger than nine by fourteen inches shall include only the cost of copies, staff time, which shall not exceed the average hourly rate of pay for staff of the public governmental body required for making copies and programming, if necessary, and the cost of the disk, tape, or other medium used

> for the duplication. Fees for maps, blueprints, or plats that require special expertise to duplicate may include the actual rate of compensation for the trained personnel required to duplicate such maps, blueprints, or plats. If programming is required beyond the customary and usual level to comply with a request for records or information, the fees for compliance may include the actual costs of such programming. *Id.*

Respondents asserted that the $40 per hour rate charged to Appellant was not for clerical staff, but rather was the rate for an attorney to review the documents in question because Appellant's request implicated attorney-client privilege.

First, the Sunshine Law does not authorize a public body to charge for attorney review time on top of search, research, duplication, and electronic programming time. *Id.* The law is not silent on attorney's fees. They are explicitly mentioned in RSMo. §§ 610.027.3-4 as being authorized for plaintiffs succeeding in their suits against government entities. The plain language of the statute demonstrates that the legislature knew how to and chose not to include attorney's fees in those fees a government entity is authorized to charge members of the public under the Sunshine Law. *See Gash v. Lafayette County*, 245 S.W.3d 229, 232 (Mo. 2008) (finding that courts must look to the plain meaning of the

statute within the context of the entire act, not just in isolation). Missouri caselaw supports this interpretation: Prior to this case, no Missouri court has ever permitted a governmental entity to charge a requester fees for an attorney to review public documents prior to their release under the Sunshine Law.

In *White v. City of Ladue*, the Court discussed this very issue. 422 S.W.3d 439, 452 n.10 (Mo. Ct. App. 2013). The trial court found that attorney research time cannot be charged. *Id.* at 445. At the appellate level, the Court referenced an amicus brief filed by the St. Louis Post-Dispatch arguing that if government entities were allowed to assess attorney's fees under the Sunshine Law, public bodies could effectively negate the Sunshine Law's goals of transparency by making the process far too expensive. *Id.* at 452 n.10. The Court expressly stated that it could not rule on whether attorney review time could be charged because the parties did not disagree with the trial court's decision that attorney review time cannot be charged to requesters under Missouri's Sunshine Law. *Id.* This was a wholly uncontroversial position until the present case.

The *White* case was recently cited for the principle that government entities cannot charge for attorney review time in *Swaine v. McCulloch*, No. 15SL-CC03842 at p. 11 (St. Louis County Circuit Court, 2017). Like the trial court in *White*, the court in *Swaine* held that the government cannot charge

members of the public attorney's fees to review public records. *Id.* The *Swaine* court also cited RSMo. § 610.024.1, which states:

> If a public record contains material which is not exempt from disclosure as well as material which is exempt from disclosure, the public governmental body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.

The Sunshine Law creates an obligation for the government entity to separate the exempt material. The Court of Appeals upheld that requirement in *State ex rel. Missouri Local Gov't Ret. Sys. v. Bill*, 935 S.W.2d 659, 664 (Mo. Ct. App. 1996). In *Bill*, the Court required the state agency to "cull the requested information from the record and disclose it" when the open information was included on records with closed information. *Id.* The agency has an obligation to separate closed material from open records, an action that is different from "search, research, and duplication," and the agency is nowhere authorized to charge requesters for completing this mandated activity.

In *Bill*, the Court also dealt with which party should bear costs. Although the costs there involved the plaintiff's attorney's fees when the state agency filed a lawsuit to determine if its own position complied with the Sunshine Law, the Court's analysis is directly relevant to the case before the

Court now:

> Second, § 610.011.1 says, "It is the public policy of this state that... records... of public governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.028 shall be liberally construed... to promote this public policy." Not requiring the public governmental body to bear Bill's expenses would open a means for public governmental bodies to thwart the public policy underlying the open meetings and records law. The agency would be free to "test" the determination of anyone requesting its records by filing a lawsuit, putting that person in the dilemma of not defending his or her request in court or enduring the significant expense of doing so. *Id.* at 666.

Missouri courts have historically protected the public from methods government agencies could potentially use to conceal public records by making the records-request process unduly expensive and burdensome. The same principle and analysis should apply here.

Such an analysis is mandated by the Sunshine Law itself. The Sunshine Law states that it must be interpreted liberally in favor of access to public records and transparency.

> It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open

> to the public unless otherwise provided by law. Sections 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed to promote this public policy. (RSMo. § 610.011.1).

Part of ensuring access includes ensuring affordability of public records. *See Deaton v. Kidd*, 932 S.W.2d 804, 807 (Mo. Ct. App. 1996) (abrogated on other grounds by *Spradlin v. City of Fulton*, Nos. WD 53104 and 53140, 1998 WL 37620 (Mo. Ct. App. Jan. 20, 1998)) (prohibiting limiting access to public records by only permitting their disclosure to the highest bidder). When the statutory language of the Sunshine Law does not explicitly authorize the government to charge fees to the public for attorney review time, the government should not be permitted to charge those fees. The public already stands at a disadvantage to its government in these matters. Adding the additional burden of covering attorney's fees would permit the government to charge exorbitant sums for public records. Nothing would prevent government entities from charging potentially hundreds of dollars per hour of review time, effectively eliminating public access to public records.

Second, the Sunshine Law's language cannot be construed to authorize the government to charge attorney's fees. Because the Sunshine Law does not explicitly authorize Respondents to charge attorney's fees to the public, Respondents attempt to read these fees into the "research" time found in RSMo. § 610.026.1. "Research" is used elsewhere in Chapter 610. In RSMo. §

610.021.23, "research" is used to label a business-related scientific process. It is used similarly in RSMo. § 610.100.5(3)(f). Although used, "research" is not defined within the Chapter. Outside of the Chapter, "research" appears separate from "legal" in multiple statutes, including RSMo. §§ 21.810.1, 68.035.1, 68.075.4, 68.205(18)(b), 100.255(6), 109.250.2, 109.260.1, 167.910.4, 260.005(3), and 393.1073.4. The use of the term "research" in Missouri statutes does not indicate it must include attorney review time without an explicit authorization to that point in statute. A statutory interpretation of "research" that comports with the Sunshine Law's mandate of liberal construction in favor of transparency does not include attorney review time.

A dictionary definition of "research" does not include attorney review time either. Merriam-Webster defines "research" as:

1. Careful or diligent search
2. Studious inquiry or examination
3. The collection of information about a particular subject

Merriam-Webster, "Research", https://www.merriam-webster.com/dictionary/research, last accessed Dec. 23, 2020.

The definition of "research" does not explicitly include attorney time. In common usage, the term "research" is often modified with the adjective "legal" to clarify the type of research being conducted. This same common usage is present in Missouri law as well, specifically RSMo. § 56.750(5).

Despite its use elsewhere, the term "legal research" is not present in the Sunshine Law when it easily could have been included.

Additionally, the Sunshine Law's specific statutory construction does not require that "research" include attorney review time. In RSMo. § 610.026.1(1), the Sunshine Law authorizes the government entity to charge for "search" and "research" time. These terms can remain distinct without reading the word "legal" before "research." "Search" is the actual seeking of the records in question. "Research" is determining where and how that search should occur to make that search "careful," "diligent," and "studious," such as researching which database or section of a warehouse to search. There is no need to insert attorney's fees into research fees, especially when attorney's fees are explicitly included elsewhere in the statute but not here.

Furthermore, "research" cannot include an attorney deciding which records are open or closed under the Sunshine Law. RSMo. § 610.024.1 requires the government to separate open from closed material and make the open material available to the public. The Sunshine Law does not state that the government must only do so upon receiving a request for public records. This separation should have occurred prior to the request in this case, and the statute does not express any support for those costs to be passed on to members of the public seeking transparency in their government. When interpreted liberally to favor transparency, as it must be, the statute

supports the opposite: The government, not the public, must bear the costs of fulfilling its duty under the law. Respondents are forbidden from having Courts read in language into the Sunshine Law to favor its position.

There is no legislative authorization for government entities to charge members of the public attorney's fees to access public records, and reading the Sunshine Law liberally in favor of transparency – as it must be read – does not permit the government to charge attorney's fees to members of the public. The legislature has the power to amend the statute at any time to include attorney's fees, and in fact attempted and failed to do so this past legislative session. House Bill 2725, 100th General Assembly (2020), accessible at https://house.mo.gov/billtracking/bills201/hlrbillspdf/5735H.01I.pdf. The Court cannot insert itself into the legislative process and must leave the statute as it is currently written.

Finally, the Sunshine Law does not authorize the charging of attorney's fees for records stored electronically or maintained in a specialty format. RSMo. § 610.026.2 only authorizes fees for making copies and the staff time needed to make those duplications. "Search" and "research" do not appear in this section. Respondents cannot charge attorneys' fees for any records

requested by Appellant that are stored electronically or in a specialty format.

The trial court and Respondents can point to no case or statutory language that authorizes the charging of attorney's fees to requesters of public records under Missouri's Sunshine Law. Appellant has pled sufficient facts to support his claim that Respondents impermissibly charged him for an attorney to review public records. The trial court erred. Respondents are not entitled to a judgment on the pleadings, and the trial court's dismissal should be reversed.

## II. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 and Missouri case law in that Missouri law provides that Respondents violated the law when they failed to provide Appellant with the earliest time the records requested in his first Sunshine Requested would be available.

The trial court erred in dismissing Appellant's case because Appellant properly pled that Respondents violated the Sunshine Law by not providing a specific date by which records would be available.

The Sunshine Law provides that "[i]f access to the public record is not granted immediately, the custodian shall give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection." RSMo. § 610.023.3. The law requires that the public entity provide a specific time and date. Respondents here did not provide

a specific date, or even an estimated specific date. (LF 2 at ¶14). Respondents instead stated that production would take at least 120 business days, which includes an infinite number of dates. *Id.* Respondents violated the plain language of the Sunshine Law by not providing a specific date. *See Swaine*, No. 15SL-CC03842 at pp. 4-5 ("In cases wherein access to public records is '*not granted immediately*', the custodian is required to give a detailed explanation of the cause for delay and to identify the place, time, and date the records will be available.") If government entities cannot be held accountable to produce documents under the requirements set by the Sunshine Law, the law will effectively be nullified.

Appellant has pled sufficient facts to support his claim that Respondents violated the Sunshine Law by failing to provide a specific date by which records would be available. The trial court erred. Respondents are not entitled to a judgment on the pleadings, and the trial court's dismissal should be reversed.

## III. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri law provides that Respondents violated the law when they failed to provide Appellant with a detailed explanation of why Respondents required at least 120 business days to produce documents requested by Appellant's first Sunshine Request.

The trial court erred in dismissing Appellant's case because Appellant

properly pled that Respondents violated the law by requiring Appellant to wait at least 120 business days without providing the requisite explanation for such a delay.

The Sunshine Law provides that "[i]f access to the public record is not granted immediately, the custodian shall give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection." RSMo. § 610.023.3. Respondents never provided a detailed explanation of the cause for further delay, therefore violating the plain language of the law. Additionally, Appellant properly alleged that the time required to produce 13,659 public records should not take more than half a year, which is the equivalent of 120 business days. (LF 2 at ¶¶ 22, 69, 71, 72). The search for records was completed in less than five hours according to emails received in Appellant's second Sunshine Request. (LF 2 at ¶¶ 36, 37). None of Respondents' letters to Appellant explained why more of a delay – let alone a wait of at least half a year – was needed. Government agencies cannot be permitted to require requesters to wait excessive amounts of time under Missouri's Sunshine Law because such delays would effectively eliminate the transparency requirements of the law. Furthermore, the law requires government agencies, on their own, to separate material that is closed to public inspection from material that is open to public inspection under the Sunshine Law. RSMo. § 610.024.1.

Respondents have provided no reason why they have not complied with this requirement and why public records are not readily available for public inspection.

Appellant has pled sufficient facts to support his claim that Respondents violated the Sunshine Law by failing to provide a detailed explanation for why additional time was needed to provide public records. The trial court erred. Respondents are not entitled to a judgment on the pleadings, and the trial court's dismissal should be reversed.

## IV. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri law provides that Appellant properly pled that Respondents violated the law when they redacted records requested in Appellant's second Sunshine Request without explanation and without closing any records.

The trial court erred in dismissing Appellant's case because Appellant properly pled that Respondents – in their response to Appellant's second Sunshine Request – redacted information improperly. Respondents redacted what appear to be portions of emails. (LF 2 at ¶ 34). The Sunshine Law states "that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law." RSMo. § 610.011.1. "Public records shall be presumed to be open unless

otherwise exempt pursuant to the provisions of this chapter." RSMo. § 610.022.5. The Sunshine Law provides a government entity with the authorization to close records under a limited set of particular circumstances. RSMo. § 610.021. "Statutory exceptions allowing records to be closed are to be strictly construed." *Great Rivers Envtl. Law Ctr. v. City of St. Peters*, 290 S.W.3d 732, 735 (Mo. Ct. App. 2009) (citing *Scroggins v. Missouri Dept. of Social Services, Children's Division,* 227 S.W.3d 498, 500 (Mo. Ct. App. 2007)).

Respondents provided no explanation for closing portions of records sent to Appellant. (LF 2 at ¶¶ 34, 35, 106, 107). Respondents may not close public records without cause. *See Tuft v. City of St. Louis*, 936 S.W.2d 113, 118-19 (Mo. Ct. App. 1996) (the governmental entity has the burden to show that the closed records ought to be closed).

Appellant properly pled that Respondents violated Missouri's Sunshine Law by improperly closing records. The trial court erred. Respondents are not entitled to a judgment on the pleadings, and the trial court's dismissal should be reversed.

## V. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri law provides that Respondents have the burden to demonstrate compliance with the Sunshine Law when redacting public records

**requested by Appellant in his second Sunshine Request.**

The trial court erred in dismissing Appellant's case because the trial court improperly left the burden of persuasion on Appellant instead of shifting it to Respondents with respect to Appellant's allegation that Respondents improperly redacted records responsive to his second Sunshine Request. The Sunshine Law provides that:

> Once a party seeking judicial enforcement of sections 610.010 to 610.026 demonstrates to the court that the body in question is subject to the requirements of sections 610.010 to 610.026 and has held a closed meeting, record or vote, the burden of persuasion shall be on the body and its members to demonstrate compliance with the requirements of sections 610.010 to 610.026. RSMo. § 610.027.2.

Appellant properly pled that Respondents were subject to the Sunshine Law. (LF 2 at ¶¶ 1-6). Appellant also properly pled that Respondents closed records through redaction. (LF 2 at ¶¶ 33, 35). The burden of persuasion should have then shifted to Respondents to provide an appropriate explanation of why the public records needed to be redacted. RSMo. § 610.027.2. Respondents could only successfully defeat Appellant's well-pled claim with an evidentiary hearing, such as one requesting summary judgment, not one requesting a judgment on the pleadings. *See Wyrick v.*

*Henry*, 2019 WL 5874668 at *3 (Mo. Ct. App. Nov. 12, 2019) (the trial court conducted an *in camera* review of the records); *Spradlin v. City of Fulton*, 982 S.W.2d 255, 259-60 (Mo. 1998) (the court reviewed evidence to determine if the government entity had met its burden of persuasion). By failing to maintain the burden-shifting approach, the trial court improperly ignored an essential element furthering Missouri policy favoring transparency. *See Spradlin*, 982 S.W.2d at 259. Respondents must meet their burden.

The trial court erred by improperly requiring Appellant to meet Respondents' burden of persuasion. Respondents are not entitled to a judgment on the pleadings, and the trial court's dismissal should be reversed.

## VI. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri law provides that Respondents knowingly violated the law when improperly responding to Appellant's first Sunshine Request because Appellant made Respondents aware of the requirements of the law.

The trial court erred in dismissing Appellant's case because Appellant properly pled that Respondents knowingly violated the law when improperly responding to his first Sunshine Request. RSMo. § 610.027.3 provides that a government entity can be sanctioned for knowingly violating the Sunshine Law. The meaning of "knowingly" is a question of law, but whether the entity's

conduct brings it within the definition is a question of fact. *Wyrick v. Henry*, 2019 WL 5874668 at *8 (Mo. Ct. App. Nov. 12, 2019) (citing *Laut v. City of Arnold*, 491 S.W.3d 191, 193, 196 (Mo. 2016)).

Appellant made Respondents aware of the requirements of Missouri's Sunshine Law and requested that Respondents reconsider their actions prior to Appellant filing a lawsuit. (LF 2 at ¶¶ 10-12, 16-31). Appellant placed Respondents on notice that their conduct was violative of Missouri's Sunshine Law. *Id.* With that knowledge, Respondents refused to take advantage of the safe harbor provision included in the Sunshine Law and seek a judgment from a court or an opinion from the Attorney General. RSMo. § 610.027.6. Instead, Respondents chose to violate the law.

Appellant has pled sufficient facts to support his claim that Respondents knowingly violated Missouri's Sunshine Law. The trial court erred. Respondents are not entitled to a judgment on the pleadings, and the trial court's dismissal should be reversed.

**VII. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri law provides that Respondents knowingly violated the law when improperly responding to Appellant's second Sunshine Request because Appellant made Respondents aware of the requirements of**

**the law.**

The trial court erred in dismissing Appellant's case because Appellant properly pled that Respondents knowingly violated the law when improperly responding to his second Sunshine Request. *See* RSMo. § 610.027.3; *Wyrick*, 2019 WL 5874668 at *8; *Laut*, 491 S.W.3d at 193, 196. As was the case with Appellant's first Sunshine Request, Respondents were aware of the requirements of Missouri's Sunshine Law when responding to his second Sunshine Request. (LF 2 at ¶¶ 27-35). Respondents produced redacted records to Appellant without providing the requisite reasoning. (LF 2 at ¶¶ 33, 35). And Respondents refused to take advantage of the safe harbor provision included in the Sunshine Law. RSMo. § 610.027.6. Respondents again chose to violate the law.

Appellant has pled sufficient facts to support his claim that Respondents knowingly violated Missouri's Sunshine Law. The trial court erred. Respondents are not entitled to a judgment on the pleadings, and the trial court's dismissal should be reversed.

**VIII. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri law provides that Respondents purposely violated the law when improperly responding to Appellant's first Sunshine Request because Appellant made Respondents aware of the requirements of**

**the law, Respondents treated Appellant differently than previous requesters, and Respondents had a motive to keep the requested records hidden from the public.**

The trial court erred in dismissing Appellant's case because Appellant properly pled that Respondents purposely violated the law when improperly responding to his first Sunshine Request. "What constitutes a… purposeful violation of the Sunshine Law is a question of law." *Laut*, 491 S.W.3d at 193. A purposeful violation is one committed "with 'a conscious design, intent, or plan to violate the law [and] with awareness of the probable consequences.'" *Id.* (quoting *Spradlin*, 982 S.W.2d at 262). Determining whether the public entity's conduct is a purposeful violation of the Sunshine Law is a question of fact. *Id.* at 196.

Appellant made Respondents aware of the requirements of Missouri's Sunshine Law and requested that Respondents reconsider their actions prior to filing a lawsuit. (LF 2 at ¶¶ 10-12, 16-31). Appellant pled that he was treated differently than previous requesters and was charged at a higher rate. (LF 2 at ¶¶ 10-12, 16-31). He also pled that the subject of his first Sunshine Request was a particularly sensitive one for Respondents and that they violated the Sunshine Law to protect individuals from negative political consequences, and Appellant presented campaign finance records and a party opponent admission to support his claim. (LF 2 at ¶¶ 11, 26, 50-52, 87-90, 121-22). Moreover,

Appellant pled that he was treated differently than previous public records requesters and that he was charged more than double the rate previous requesters had been charged. (LF 2 at ¶¶ 15, 47). Appellant properly pled his claim against Respondents. *See Buckner v. Burnett*, 908 S.W.2d 908, 911 (Mo. Ct. App. 1995) (finding that an agency forestalling production of documents until it is sued is a purposeful violation of the Sunshine Law); *Wyrick*, 2019 WL 5874668 at *8 (implementing a policy to deny public records to requesters with legal disputes involving the government entity was a purposeful violation of the Sunshine Law); *Strake v. Robinwood W. Cmty. Improvement Dist.*, 473 S.W.3d 642, 645-46 (Mo. 2015) (refusing to turn over a settlement agreement requested under the Sunshine Law, even if the settlement included a confidentiality agreement, was a purposeful violation). Any dispute between the parties on this claim is a factual one that is properly addressed during summary judgment or trial, not on a motion for a judgment on the pleadings.

Appellant has pled sufficient facts to support his claim that Respondents purposely violated Missouri's Sunshine Law. The trial court erred. Respondents are not entitled to a judgment on the pleadings, and the trial court's dismissal should be reversed.

## IX. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri law provides that Respondents purposely violated the law when improperly

**responding to Appellant's second Sunshine Request because Appellant made Respondents aware of the requirements of the law, Respondents treated Appellant differently than previous requesters, and Respondents had a motive to keep the requested records hidden from the public.**

The trial court erred in dismissing Appellant's case because Appellant properly pled that Respondents purposely violated the law when improperly responding to his second Sunshine Request. *See Laut*, 491 S.W.3d at 193, 196; *Spradlin*, 982 S.W.2d at 262.

Appellant made Respondents aware of the requirements of Missouri's Sunshine Law and requested that Respondents reconsider their actions prior to Appellant filing a lawsuit. (LF 2 at ¶¶ 10-12, 16-31). Respondents closed records without reason. (LF 2 at ¶¶ 33, 35). Appellant's second Sunshine Request was part of a larger investigation into dark money corruption in government, a particularly sensitive topic for Respondents that provided them with a motive to violate the Sunshine Law in order to protect individuals from negative political consequences. (LF 2 at ¶¶ 11, 26, 50-52, 87-90, 121-22). Appellant properly pled his claim against Respondents. *See Buckner*, 908 S.W.2d at 911; *Wyrick*, 2019 WL 5874668 at *8; *Strake*, 473 S.W.3d at 645-46. Any dispute between the parties on this claim is a factual one that is properly

addressed during summary judgment or trial, not on a motion for a judgment on the pleadings.

Appellant has pled sufficient facts to support his claim that Respondents purposely violated Missouri's Sunshine Law. The trial court erred. Respondents are not entitled to a judgment on the pleadings, and the trial court's dismissal should be reversed.

## X. The trial court erred in dismissing Appellant's case because of RSMo. Chapter 610 in that Missouri statutory and case law, the Missouri Constitution, and the United States Constitution provide that Respondents abused their discretion by acting arbitrarily and capriciously in denying Appellant's request for Respondents to waive or reduce fees associated with his first Sunshine Request.

The trial court erred in dismissing Appellant's case because Appellant properly pled that Respondents acted arbitrarily and capriciously and abused their discretion in denying Appellant's request for them to waive or reduce fees.

An agency may not act arbitrarily or capriciously. *See, e.g., Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Educ.*, 34 S.W.3d 266, 281 (Mo. Ct. App. 2000). This prohibition stems from state and federal constitutional protections: the equal protection clauses and the due process clauses. Mo.

Const. Art. I, § 10; U.S. Const. Amd. 14; Mo. Const. Art. I, § 2; U.S. Const. Amd. 5.

"Equal protection mandates that persons similarly situated in relation to a statute be treated the same." *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. 1992) (citing *Rinaldi v. Yeager,* 384 U.S. 305, 309 (1966)). The equal protection clause protects individuals from the state, including when it acts through "its executive or administrative offices." *Tunstill v. Eagle Sheet Metal Works*, 870 S.W.2d 264, 272 (Mo. Ct. App. 1994). Under an equal protection analysis, the Court applies rational basis review when the right in question is not fundamental and a protected class is not implicated. *Kansas City Premier Apartments, Inc. v. Missouri Real Estate Comm'n*, 344 S.W.3d 160, 170 (Mo. 2011); *Elliott v. Carnahan*, 916 S.W.2d 239, 241–42 (Mo. Ct. App. 1995). In those situations, the Court looks to see if the "classification is totally arbitrary or lacks any legitimate rationality." *Elliott*, 916 S.W.2d at 242. Under the due process clauses, "a protected liberty interest may be created by the language used in statutes or regulations." *Id.* at 241.

Missouri's Sunshine Law states:

> 1. It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.200 shall be liberally construed and their exceptions strictly

construed to promote this public policy.

2. Except as otherwise provided by law, all public meetings of public governmental bodies shall be open to the public as set forth in section 610.020, all public records of public governmental bodies shall be open to the public for inspection and copying as set forth in sections 610.023 to 610.026, and all public votes of public governmental bodies shall be recorded as set forth in section 610.015. (RSMo. § 610.011).

The law creates a liberty interest in accessing public records. Moreover, the government is prohibited from acting arbitrarily or capriciously and may not treat Appellant differently than others seeking public records without a rational basis to do so.

Appellant pled that Respondents charged him a higher rate for records than they charged others, specifically a rate of $40 per hour instead of $19 per hour. (LF 2 at ¶¶ 15, 47). This unequal treatment on its own is a sufficient basis to state a claim against Respondents. Appellant further pled that Respondents refused to waive fees for his first Sunshine Request but did waive fees for his second Sunshine Request, despite the request for the fee waivers being based on substantially similar grounds. (LF 2 at ¶¶ 12, 18, 19, 28, 32) (first Sunshine Request: law enforcement, consumer protection, campaign finance laws, government transparency, the potential need for

legislative reform, and rooting out corruption; second Sunshine Request: campaign finance laws, law enforcement, and transparency in government). Appellant properly pled that Respondents' different reactions to Appellant's two Sunshine Requests at issue here were without reason and therefore arbitrary and capricious. Any factual disputes are appropriately dealt with at an evidentiary hearing, not on a motion for a judgment on the pleadings. *See City of Dardenne Prairie*, 529 S.W.3d at 17. Appellant sufficiently pled that Respondents acted arbitrarily and capriciously and abused their discretion in refusing to waive fees with respect to his first Sunshine Request.

Appellant has pled sufficient facts to support his claim that Respondents acted arbitrarily and capriciously. The trial court erred. Respondents are not entitled to a judgment on the pleadings, and the trial court's dismissal should be reversed.

## CONCLUSION

The trial court erred in dismissing Appellant's case. Appellant properly pled his case that Missouri's Sunshine Law provided Appellant with the right to receive pubic records from Respondents and Respondents violated that law.

For all of the reasons contained in this brief, Appellant requests that the Court reverse the decision of the trial court, find that Respondents violated Missouri's Sunshine Law, and remand for further proceedings.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that on the 28th day of December, 2020, the foregoing **Appellant's Substitute Brief** was filed and served electronically via Missouri's Case.net system on all counsel of record.

I further certify that the foregoing complies with the requirements contained in Rule 84.06(b) and the limitations contained in Special Rule 360 in that the brief contains 9,246 words.

*/s/Elad Gross*
Elad Gross
Attorney at Law

## CERTIFICATE OF ORIGINAL SIGNATURE

I hereby certify that on this 28th day of December, 2020, the original of the foregoing document was signed by the attorney of record.

*/s/Elad Gross*
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