

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI  
CIVIL DIVISION

**BROOKE SCHREIER GANZ, both indi- )  
vidually and as an authorized representa- )  
tive of RECLAIM THE RECORDS, a non- )  
profit, unincorporated association, )**

Plaintiffs, )

vs. )

**MISSOURI DEPARTMENT OF )  
HEALTH AND SENIOR SERVICES, )**

Defendant. )

Case No.16AC-CC00503

**AFFIDAVIT OF BERNARD J. RHODES**

STATE OF MISSOURI )  
 ) ss  
COUNTY OF JACKSON )

I, Bernard J. Rhodes, having first been duly sworn on my oath, state as follows:

**My background**

1. I am a partner in the Kansas City, Missouri, office of Lathrop Gage LLP (formerly Lathrop & Gage), where I head the firm’s media law practice group.
2. During my more than 30 years at the firm, I have dealt with literally hundreds of Missouri Sunshine Law requests, denials, and cost estimates.
3. In addition, I have litigated numerous open records disputes in Missouri state and federal courts.
4. Most recently, for example, I tried a case on behalf of my client, *The Kansas City Star*, in which the court (a) rejected Jackson County’s claim that certain records were exempt under the Sunshine Law, and (b) ordered the county to pay *The Star’s* attorney’s fees.

### **My retention by Reclaim the Records**

5. In June of 2016, I was retained by Brooke Schreier Ganz, on behalf of Reclaim the Records, to assist her in obtaining public records from the Missouri Department of Health and Senior Services.

6. At that time, Ms. Ganz provided me with a copy of DHSS' \$1.49 million cost estimate to provide her with an index of Missouri births from 1920, and an index of Missouri deaths from 1968. *See Ganz Aff. Ex. E.*

### **My discussions with DHSS' General Counsel**

7. On June 28, 2016, I spoke by phone with Nikki Loethen, DHSS' General Counsel, about the cost estimate.

8. During my telephone call with Ms. Loethen she told me the \$1.49 million estimate was based on having a research analyst review each record separately and then export each record one at a time.

9. I advised Ms. Loethen that the \$1.49 million cost estimate violated the Sunshine Law, which does not allow for "per record" charges when the records are maintained on a computer database, but instead expressly provides that the only allowable charges are the actual time it takes a staff member to retrieve the records from the database.

10. I asked Ms. Loethen to provide me information as to the type of database DHSS used to maintain the birth and death listings, so that I could determine the appropriate method of providing the two listings in a manner consistent with the Sunshine Law.

11. On July 7, 2016, Ms. Loethen sent me an e-mail, a copy of which is attached as **Exhibit 1**, advising that DHSS maintains the listings on an IBM mainframe computer in a flat file database, *i.e.*, there is only one record per line.

12. On July 12, 2016, I sent Ms. Loethen an e-mail, a copy of which is attached as **Exhibit 2**, and explained how—using the information she had provided me concerning DHSS’ computer system—the two listings could be produced by using two simple date range searches, *i.e.*, one search for the birth records and one search for the death records.

13. On July 22, 2016, when I had not received any response from Ms. Loethen, I sent her a follow-up e-mail.

14. Later that same day, Ms. Loethen sent me an e-mail, a copy of which is attached as **Exhibit 3**, stating that she was still waiting to hear from DHSS staff whether it was possible to run the searches in the manner I had proposed.

#### **DHSS’ revised cost estimate**

15. On August 1, 2016, when I had not received a response from Ms. Loethen, I sent her a follow-up e-mail.

16. Later that same day, Ms. Loethen sent me an e-mail dramatically revising the cost estimate from \$1,464,973.92 to \$5,174.04.

17. The text of Ms. Loethen’s e-mail is set forth in Paragraph 56 of the accompanying Statement of Uncontroverted Facts, and a copy is attached as **Exhibit 4**.

18. I responded to Ms. Loethen’s e-mail the same day, stating “Thank you. I will await your further response.”

#### **DHSS denies Ms. Ganz’s requests**

19. On August 9, 2016, Ms. Loethen wrote me and—rather than providing information as to whether it was possible to run all the searches in one year, as she stated she would do in her August 1st e-mail—advised me that DHSS was denying both Ms. Ganz’s

request for birth listings and her request for death listings, and was refusing to provide either listing.

20. A copy of Ms. Loethen's letter is attached as **Exhibit 5**.

21. On August 24, 2016, I sent Ms. Loethen an 11-page letter advising her that (a) DHSS' reversal of its position was contrary to the Missouri Sunshine Law, and (b) Ms. Ganz intended to pursue litigation—and to seek penalties and attorneys' fees for DHSS' purposeful violation of the Sunshine Law—unless DHSS provided the requested records at actual cost.

22. A copy of my letter is attached as **Exhibit 6**.

23. Ms. Loethen never responded to my letter.

#### **The lawsuit**

24. Accordingly, on November 23, 2016, I filed the instant lawsuit against DHSS on behalf of Ms. Ganz and Reclaim the Records.

25. On February 14, 2017, DHSS filed its Answer, a copy of which is attached as **Exhibit 7**.

26. During the lawsuit, I served a request for production of documents on DHSS.

27. DHSS served a response to that request, a copy of which is attached as **Exhibit 8**.

28. In addition, DHSS produced documents in response to that request, which it Bates-labeled using the prefix: "DHSS."

29. Among the documents DHSS produced are the following:

- DHSS000108-109, February 17, 2016 email from Nikki Loethen to Emily Hollis, attached as **Exhibit 9**;

- DHSS000116-119, February 17, 2016 email from Emily Hollis to DHSS staff, attached as **Exhibit 10**;
- DHSS000120, February 17, 2016 email from Emily Hollis to DHSS staff, attached as **Exhibit 11**;
- DHSS000290, April 18, 2016 email from Emily Hollis to Sharon Ayers and Nikki Loethen, attached as **Exhibit 12**;
- DHSS000418-421, June 14, 2016 calendar notices, attached as **Exhibit 13**;
- DHSS000423, June 15, 2016, Craig Ward out of office response, attached as **Exhibit 14**;
- DHSS000424-430, June 17, 2016 emails from Craig Ward to various out-of-state officials, attached as **Exhibit 15**;
- DHSS000484-487, June 22, 2016 email from Brooke Ganz to Nikki Loethen, attached as **Exhibit 16**;
- DHSS000538-539, July 21, 2016 email from Garland Land to Loise Wambuguh, attached as **Exhibit 17**;
- DHSS000556-558, July 22, 2016 email from Loise Wambuguh to Garland Land, attached as **Exhibit 18**;
- DHSS000596, August 22, 2016 email from Craig Ward to out-of-state officials, attached as **Exhibit 19**.

#### **DHSS' cost estimates – hourly rate**

30. The Missouri Sunshine Law provides that a public governmental agency may charge for staff time to produce records maintained on computer facilities. *See* Mo. Rev. Stat. § 610.026.1(2).

31. Specifically, Section 610.026 provides as follows:

Fees for providing access to public records maintained on computer facilities ... 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.

Mo. Rev. Stat. § 610.026.1(2) (emphasis added).

32. Ms. Loethen provided me with two cost estimates: her June 28, 2016, cost estimate of \$1.47 million, and her August 1, 2016, cost estimate of \$5,174.04. *See* Ex. 4 and Ganz Ex. E.

33. In both of those estimates, Ms. Loethen used an hourly rate of \$41.78. *See* Ex. 4 and Ganz Ex. E.

34. In the request for documents I served on DHSS, I included requests for documents concerning DHSS various cost estimates. *See* Ex. 8, Request Nos. 3-4.

35. Among the documents DHSS produced in response to these requests was a one-page PDF file titled “DHSS 665 – Cost estimate for birth and death.pdf,” which is attached as **Exhibit 20**.

36. As shown in this excerpt from Exhibit 20, DHSS used five separate components to arrive at its hourly rate of \$41.78:

ITEM	QTY	DESCRIPTION	UNIT COST	per	Total
1	72	Birth lists for 96 years Which includes direct PS rate at \$22.61; Indirect rate at \$6.96; Fringe at \$10.70; Network \$.093; and Server Charge of \$0.58	41.78	hour	3,008.16

37. Specifically, the document shows the rate of \$41.78 “per hour” and states this rate “includes” the following:

direct PS rate	\$22.61
indirect rate	\$6.96
Fringe	\$10.70
Network	\$0.93 <sup>1</sup>
<u>Server Charge</u>	<u>\$0.58</u>
<b>Total</b>	<b>\$41.78</b>

<sup>1</sup> The actual document uses the rate of \$.093 (as opposed to \$0.93), but this is plainly a typographical error.

38. The first component—the “direct PS rate”—is the hourly rate of pay (per the “PS,” *i.e.*, Pay Scale) paid directly to the staff member.

39. In addition to serving a Request for Production of Documents on DHSS, I also took a Rule 57.03(b)(4) deposition of DHSS’ authorized representative, Kerri Tesreau, the Acting Director for the Division of Community and Public Health.

40. A copy of the Notice of Deposition is attached as **Exhibit 21**, and selected excerpts from the transcript of the deposition are attached as **Exhibit 22**.

41. Among the topics as to which the witness was designated to testify was the methodology used by DHSS to determine the hourly rate used in DHSS’s cost estimates. *See* Ex. 21, Topics 9-10.

42. In her deposition, Ms. Tesreau testified that the work to be performed responding to Ms. Ganz’s request was work that would have been performed by one or more “Research Analysts.” Ex. 22, 27:18-28:13.

43. Specifically, she testified the work would have been performed by persons with the job titles Research Analyst I, Research Analyst II, or Research Analyst III. Ex. 22, 27:18-28:13.

44. She further explained that persons employed within these three categories would have been paid at varying rates—all within a set pay scale range. Ex. 22, 29:11-30:1.

45. She further testified that to determine the “average hourly rate of pay for staff time,” “we would take the average of each of those three ranges and then average that.” Ex. 22, 30:3-10.

46. Among the documents DHSS produced in response to my request for production of documents was a one-page PDF titled “DHS 667 – RA Salary for data requests.pdf,” attached as **Exhibit 23**.

47. As shown in this excerpt from Exhibit 23, the average rate of pay for a Research Analyst I (abbreviated “RA I”) was \$14.51<sup>2</sup>, the average rate of pay for a Research Analyst II (“RA II”) was \$17.73, and the average rate of pay for a Research Analyst III (“RA III”) was \$20.65:

	RA I		RA II		RAIII	
Average	\$1,257.50		\$1,536.67	\$17.73	\$1,789.27	\$20.65
Maximum	\$1,257.50		\$1,593.00	\$18.38	\$24.57	\$24.57
	<b>2x Month</b>	<b>Hourly</b>	<b>2x Month</b>	<b>Hourly</b>	<b>2x Month</b>	<b>Hourly</b>
	\$1,257.50	\$14.51	\$1,508.50	\$17.41	\$1,622.00	\$18.72
			\$1,508.50	\$17.41	\$1,682.50	\$19.41
			\$1,593.00	\$18.38	\$1,682.50	\$19.41
					\$1,682.50	\$19.41
					\$1,682.50	\$19.41
					\$1,715.50	\$19.79
					\$1,747.50	\$20.16
					\$1,747.50	\$20.16
					\$1,846.00	\$21.30
					\$1,955.50	\$22.56
					\$2,085.00	\$24.06
					\$2,129.00	\$24.57

48. The average of those averages is \$17.63, *i.e.*,  $\$14.51 + \$17.73 + \$20.65 = \$52.89$ , divided by 3 = \$17.63.

<sup>2</sup> Note there is no entry in the “average” row for a Research Analyst I; this is because there is only one Research Analyst I, so that employee’s salary is necessarily the “average.”



49. Thus, using the methodology described by Ms. Tesreau in her deposition, the average hourly rate of pay should have been \$17.63.

50. As noted above, however, DHSS's cost estimates used an hourly rate of pay of \$22.61 per hour—not \$17.63.<sup>3</sup>

**DHSS' cost estimates – additions to the hourly rate**

51. As also noted above, DHSS started with the “direct PS rate,” but then added additional amounts on top of that to get to the \$41.78 hourly rate it used in its cost estimates.

52. For example, DHSS took the “direct PS rate” of \$22.61 and then added \$10.70 an hour in “fringe” benefits. *See* Ex. 20; Ex. 22, 30:11-17.

53. DHSS then took the sum of (a) the “direct PS rate” and (b) the “fringe” benefit, and multiplied the sum of those two numbers by an “indirect allocation” of general administrative expense factor of 20.9%, or another \$6.96 an hour. *See* Ex. 20; Ex. 22, 30:18-33:11.

54. DHSS then added to that number a “network” charge of \$.93 per hour, and a “server” charge of \$0.58 per hour. *See* Ex. 20.

55. The total of these charges equals the \$41.78 hourly charge that DHSS used in its cost estimates.

Actual hourly rate	\$22.61
Fringe benefits	\$10.70
Indirect allocation	\$6.96
Network charge	\$0.93
<u>Server charge</u>	<u>\$0.58</u>
<b>Total</b>	<b>\$41.78</b>

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<sup>3</sup> DHSS arrived at its \$22.61 hourly rate by taking the average of (a) the average rate of pay for a Research Analyst III (\$20.65), and (b) the maximum rate of pay for a Research Analyst III (\$24.57), and averaging those two numbers, *i.e.*,  $\$20.35 + \$24.57 = \$45.22$  divided by 2 = \$22.61.

### DHSS' cost estimates – number of hours

56. As Ms. Loethen stated in her August 1, 2016, e-mail to me, DHSS cost estimate of \$5,174.04 was based on searches for one year at a time. *See* Ex. 4.

57. Among the documents DHSS produced in response to my request for production of documents was a one-page PDF titled “DHS 656 – Birth and Death Listing – Time to run 1920 & 1968.pdf,” attached as **Exhibit 24**.

58. As shown in this excerpt from Exhibit 24, the estimate for the birth listings was based on 96 separate searches (one for each of the 96 years from 1920 through 2015) at an estimated time per search of .75 hours per search:

<b>Birth - 1920</b>		
Action	Time (minutes)	Hours
Download file from mainframe to the server	10	
Developing /coding SAS program	5	
Run SAS program/clean data/ format	30	
<b>Total</b>	<b>45</b>	<b>0.75</b>

**1920-2015 takes approximately 72 (0.75\*96) hours**

59. The same document shows the estimate of the death listings was based on 48 separate searches (for each of the 48 years from 1968 through 2015) at an estimated time per search of 1.08 hours per search:

<b>Death - 1968</b>		
Action	Time (minutes)	Hours
Developing /coding SAS program	5	
Run SAS program/clean data/ format	60	
<b>Total</b>	<b>65</b>	<b>1.08</b>

**1868-2015 takes approximately 52 (48\*1.08) hours**

60. In Ms. Loethen's August 1, 2016, e-mail forwarding me the estimate, she stated that she had asked staff to determine whether it was possible to run all the years in one search (as opposed separate searches for each year), and that she was waiting for an answer to that question. *See* Ex. 4.

61. Ms. Loethen never advised as to whether it was possible to run all the years at one time.

62. However, in the deposition of Ms. Tesreau, the authorized DHSS representative, she testified that DHSS never tried to run anything other than a one-year search. *See* Ex. 22, 40:17-41:4.

63. Ms. Tesreau speculated, however, that she did not believe it was possible to run a ten-year search. *See* Ex. 22, 40:20-24.

64. Accordingly, she believed that an effective search would be somewhere between one year and ten years. *See* Ex. 22, 40:25-41:4.

#### **The actual cost of producing the birth/death listings**

65. If DHSS had used a five-year search period, *i.e.*, halfway between one year and ten years, the number of hours needed to perform the resulting 20 searches for the birth listings (96 years divided by 5 years per search) would have been 15 hours (20 searches x .75 hours per search), while the number of hours needed to perform the resulting 10 searches for the birth listings (48 years divided by 5 years per search) would have been 10.8 hours (10 searches x 1.08 hours per search).

66. If DHSS had used the actual "average hourly rate of pay for staff" of \$17.63—without additions for fringe benefits, indirect allocation of overhead, etc.—the total cost of providing the birth listings by using five-year searches would have been

\$264.45 (15 hours x \$17.63 an hour), while the total cost of providing the death listings by using five-year searches would have been \$190.40 (10.8 hours x \$17.63 an hour).

67. Based on these calculations, the combined total for both listings would have been \$454.85, or less than ten percent of DHSS' last estimate of \$5,174.04—or roughly three-tenths of one percent of DHSS' original \$1.49 million estimate.

\_\_\_\_\_  
Bernard J. Rhodes

SUBSCRIBED AND SWORN to before me on this 21<sup>st</sup> day of May, 2019.

\_\_\_\_\_  
Notary Public

My Commission Expires:

**TAMMY L. TROUTNER**  
**Commission #13481268**  
**Notary Public - Notary Seal**  
**STATE OF MISSOURI**  
**Clay County**  
**My Commission Expires: January 30, 2021**