

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI  
CIVIL DIVISION

**BROOKE SCHREIER GANZ, both** )  
**individually and as an authorized** )  
**representative of RECLAIM THE** )  
**RECORDS, a non-profit, unincorporated** )  
**association,** )

Plaintiffs, )

Case No. \_\_\_\_\_

vs. )

Division No. \_\_\_\_\_

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

serve: Nikki Loethen )  
General Counsel )  
912 Wildwood Drive )  
Jefferson City, MO 65102 )

Defendant.

**PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs Brooke Schreier Ganz, both individually and as an authorized representative of Reclaim the Records, a non-profit, unincorporated association, for their Petition for Declaratory and Injunctive Relief against Defendant Missouri Department of Health and Senior Services, state as follows:

**The Parties, Jurisdiction and Venue**

1. Plaintiff Brooke Schreier Ganz is the founder of Plaintiff Reclaim the Records, a non-profit, unincorporated association of genealogists, historians, researchers and open government advocates committed to making genealogical data readily available to the public for free.

2. Ms. Ganz will fairly and adequately protect the interest of the association and its members.

3. Defendant Missouri Department of Health and Senior Services (“DHSS”) is a governmental entity created by the statutes of the State of Missouri. *See* Chapter 192 of the Missouri Revised Statutes.

4. Jurisdiction is proper in this Court because DHSS has its principal place of business in Jefferson City, Cole County, Missouri. *See* Mo. Rev. Stat. § 610.027.1

### **The Sunshine Law Requests**

5. On February 13, 2016, Ms. Ganz, on behalf of Reclaim the Records, mailed two Missouri Sunshine Law requests to DHSS; one request was for birth listings for the period 1910 through 2015, while the second request was for death listings for the same period.

6. On February 19, 2016, Emily Hollis of DHSS acknowledged receipt of Ms. Ganz’s Sunshine Law requests and stated that a response to Ms. Ganz’s requests would be provided on or after March 31, 2016.

7. On April 18, 2016, after Ms. Ganz had not received a response to her requests, she sent a follow-up e-mail in which she noted the promised response date of March 31, 2016.

8. On May 27, 2016, Nikki Loethen, DHSS’s General Counsel, wrote Ms. Ganz and advised Ms. Ganz that DHSS was still working on a cost estimate for fulfilling Ms. Ganz’s requests, and stated that the cost estimate would be provided in approximately five business days.

9. On June 22, 2016, after Ms. Ganz still had not received a response to her requests, she sent a follow-up e-mail in which she noted the promised response date of five business days following May 27, 2016.

### The First Cost Estimate - \$1,490,220

10. On June 24, 2016—more than four months after DHSS acknowledged receipt of Ms. Ganz’s Sunshine Law requests—Ms. Hollis responded to Ms. Ganz’s requests with a cost estimate of nearly \$1.5 million, as shown below:

From: Hollis, Emily	06/24/2016
Subject: RE: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2016	
<p>Dear Ms. Ganz:</p> <p>Pursuant to your request for an estimate and Section 610.026, RSMo, compliance with the two records requests below is estimated to cost the following:</p> <p>Birth list: \$993,480 (23,376 hours at \$42.50/hour)          Death list: \$496,740 (11,688 hours at \$42.50/hour)</p> <p>Thank you.</p> <p>Emily E. Hollis          Office of General Counsel          Dept. of Health &amp; Senior Services          P.O. Box 570          Jefferson City, MO 65102          Phone: (573) 751-6005          Facsimile: (573) 751-0247          Email: <a href="mailto:Emily.Hollis@health.mo.gov">Emily.Hollis@health.mo.gov</a> &lt;mailto:Emily.Hollis@health.mo.gov&gt;</p>	

### DHSS Estimates It Will Take 20 Years to Fulfill the Requests

11. Pursuant to applicable Missouri Department of Administration regulations, a full-time Missouri state government employee works a 40-hour week, and is entitled to a minimum of three weeks’ paid vacation per year, three weeks’ paid sick leave per year, and 12 paid holidays per year. *See* 1 CSR 20-5.010-.020.

12. As a result, a typical full-time Missouri state government employee works 1,744 hours a year (52 weeks x 40 hours = 2,080 hours – 120 hours vacation – 120 hours sick leave – 96 hours vacation = 1,744 hours).

13. Accordingly, DHSS's estimate assumes it would take an employee more than 20 years to fulfill Reclaim the Records' Sunshine Law requests (23,376 hours + 11,688 hours = 35,064 hours ÷ 1,744 hours a year = 20 years, 6 months and 4 days).

**The Second Cost Estimate - \$1,464,973.92**

14. On June 28, 2016, Ms. Loethen sent Ms. Ganz an e-mail revising the hourly rate by 72¢ an hour, but maintaining the identical 35,064 hours.

From: Loethen, Nikki	06/28/2016
Subject: RE: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2016	
<p>Dear Ms. Ganz:</p> <p>After the email below was sent to you, the department realized an error in the calculation of the hourly rate. Here are the revised estimates based on the corrected rate:</p> <p style="background-color: yellow;">Birth list: \$976,649.28 (23,376 hours at \$41.78/hour)</p> <p style="background-color: yellow;">Death list: \$488,324.64 (11,688 hours at \$41.78/hour)</p> <p>Sincerely,</p> <p>Nikki Loethen            General Counsel            Department of Health &amp; Senior Services            921 Wildwood Drive            Jefferson City, MO 65102            Phone: 573.751.6005            Facsimile: 573.751.0247</p>	

### Reclaim the Records Retains Counsel

15. Given DHSS's unreasonable delays and exorbitant cost estimates, Reclaim the Records retained Missouri counsel, Bernard J. Rhodes of Lathrop & Gage.

16. Mr. Rhodes requested DHSS provide information regarding the type of database DHSS uses to maintain the birth and death lists.

17. On July 7, 2016, Ms. Loethen sent Mr. Rhodes an e-mail advising that DHSS maintains the listings on an IBM mainframe computer in a flat file database format, *i.e.*, there is only one record per line.

18. Using this information, on July 12, 2016, Mr. Rhodes sent Ms. Loethen an e-mail and explained how 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.

19. Mr. Rhodes even provided Ms. Loethen with the toll-free "Help Desk" number for the software provider DHSS uses to retrieve records from its database.

20. Finally, Mr. Rhodes noted that a review of DHSS's website revealed numerous published reports which had been generated using the very methodology he described in his e-mail.

21. On July 22, 2016, Ms. Loethen sent Mr. Rhodes an e-mail stating: "Staff is reviewing the information you provided below to determine whether **lists compliant with Section 193.245** could be created in fewer hours, thereby reducing the cost estimates. I will check on the status of this and get back to you." (Emphasis added).

### The Third Cost Estimate - \$5,174.04

22. On August 1, 2016, Ms. Loethen sent Mr. Rhodes an e-mail revising the cost estimate from \$1.5 million to \$5,000, as shown below:

**Rhodes, Bernie**

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From: Loethen, Nikki <Nikki.Loethen@health.mo.gov>  
 Sent: Monday, August 01, 2016 10:58 AM  
 To: Rhodes, Bernie  
 Subject: RE: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2015

Staff has determined that they can run the lists for one year at a time versus one day at a time as originally estimated, which drastically reduces the cost estimate (see below). However, I have asked them to determine whether it is possible to run all the years at a time, thereby further reducing the estimate. If running all the years at a time is not possible, I have asked them to explain why. I will let you know what I learn. The original estimate was based on a misunderstanding regarding what the statute allows in terms of providing a list for a particular date.

Birth lists: 72 hours at \$41.78/hour = \$3,008.16  
 Death lists: 51.84 hours at \$41.78/hour = \$2,165.88

Nikki Loethen  
 General Counsel  
 Department of Health & Senior Services  
 912 Wildwood Drive  
 Jefferson City, MO 65102  
 Phone: 573.751.6005  
 Fax: 573.751.0247

23. While this estimate was dramatically smaller than the first two \$1.5 million estimates, it was nevertheless still based on multiple searches, *i.e.*, a separate search for each year.

24. As expressly stated in Ms. Loethen's e-mail, DHSS was researching whether it could—as Mr. Rhodes had suggested—run a single search for multiple years.

25. Ms. Loethen advised that in the event DHSS could not run a single search, she would advise why not.

### DHSS Does a 180 Degree Turn

26. At no point during this period did DHSS ever make any mention of, or citation to, any exemption under the Sunshine Law; instead, the only topic discussed was the cost of providing the two listings.

27. Quite the contrary, Ms. Loethen expressly stated in her July 22, 2016 e-mail that she would provide a cost estimate for “lists compliant with Section 193.245.”

28. Moreover, in her August 1, 2016 e-mail, Ms. Loethen blamed the earlier \$1.5 million estimates “on a misunderstanding regarding what the statute allows,” necessarily meaning DHSS’s \$5,000 estimate contained in her August 1, 2016 e-mail was based on a correct understanding of the statute.

29. Despite that statement, on August 9, 2016, Ms. Loethen wrote Mr. Rhodes and—for the very first time—asserted that pursuant to Missouri Revised Statutes § 193.425(1) the Department was refusing to provide the requested records, despite the fact her July 22, 2016 e-mail specifically stated she would be providing a cost estimate for “**lists compliant with Section 193.245.**” (Emphasis added).

30. On August 24, 2016, Mr. Rhodes sent Ms. Loethen an 11-page letter advising her that (a) DHSS’s reversal of position was contrary to the Missouri Sunshine Law, and (b) Reclaim the Records intended to pursue litigation—and to seek penalties and attorneys’ fees for DHSS’s purposeful violation of the Sunshine Law—unless the Department provided the requested lists at actual costs.

31. To date, Ms. Loethen has willfully refused to respond to Mr. Rhodes’ August 24, 2016 letter.

## COUNT I

### VIOLATION OF THE MISSOURI SUNSHINE LAW – WAIVER

32. Plaintiffs incorporate by reference the allegations of paragraph 1 through 31 as though more fully set forth herein.

33. The Sunshine Law provides that “[i]t is the public policy of this state that ... records ... be open to the public unless otherwise provided by law” and that “[e]xcept as otherwise provided by law, ... all public records of public governmental bodies shall be open to the public for inspection and copying.” *See* Mo. Rev. Stat. § 610.011.1-2.

34. DHSS is a “public governmental body” as defined by the Missouri Sunshine Law because it is a “department or division of the state.” *See* Mo. Rev. Stat. § 610.010(4)(c).

35. The documents requested by Plaintiffs are “public records” as defined by the Missouri Sunshine Law because they are “record[s] . . . retained by or of any public governmental body.” *See* Mo. Rev. Stat. § 610.010(6).

36. The Missouri Sunshine Law requires that a “request for access to a public record shall be acted upon as soon as possible, but in no event later than the end of the third business day following the date the request is received by the custodian of records.” *See* Mo. Rev. Stat. § 610.023.3.

37. At no time during the three-day period set forth in Section 610.023.3 did DHSS state to Ms. Ganz that her request was denied.

38. To the contrary, for nearly six months, DHSS stated it would provide the requested documents, but was uncertain as to the cost.



39. In fact, it was not until nearly six months after Ms. Ganz made her requests that DHSS ever asserted any basis for denying her requests.

WHEREFORE, Plaintiffs Brooke Schreier Ganz and Reclaim the Records respectfully request that the Court enter judgment in their favor, finding that DHSS waived any right to withhold documents by failing to comply with Mo. Rev. Stat. § 610.023.4, and ordering DHSS to provide Plaintiffs Brooke Schreier Ganz and Reclaim the Records the requested listings, together with such other and further relief as the Court deems just and necessary.

## COUNT II

### **VIOLATION OF THE MISSOURI SUNSHINE LAW – INVALID CLAIM OF EXEMPTION**

40. Plaintiffs incorporate by reference the allegations of paragraph 1 through 39 as though more fully set forth herein.

41. In Ms. Loethen’s August 9, 2016, letter, she cited Section 193.245 of the Vital Records Act and asserted that this section gives DHSS “discretion” to grant or deny a request for a listing of birth and deaths.

42. Section 193.245 provides as follows:

It shall be unlawful for any person to permit inspection of, or to disclose information contained in, vital records or to copy or issue a copy of all or part of any such record except as authorized by this law and by regulation or by order of a court of competent jurisdiction or in the following situations:

- (1) A listing of persons who are born or who die on a particular date may be disclosed upon request, but no information

from the record other than the name and the date of such birth or death shall be disclosed;

- (2) The department may authorize the disclosure of information contained in vital records for legitimate research purposes;
- (3) To a qualified applicant as provided in section 193.255;
- (4) Copies of death records over fifty years old may be disclosed upon request.

Mo. Rev. Stat. § 193.245.

43. Any reasonable interpretation of this section leads to the conclusion that while it is “unlawful for any person to ... disclose information contained in vital records,” it is not unlawful for any person to disclose “[a] listing of persons who were born or who died on a particular date.”

44. In other words, the term “may be disclosed” means simply that those listings “may be disclosed” without violating the Act; the use of the term “may be disclosed” does not, in any way, grant the Department “discretion” to release—or not release—a listing of births or deaths.

45. In *State ex rel. Vernon County v. King*, 36 S.W. 681 (1896), the Missouri Supreme Court explained that “[i]t is ... a well-recognized rule of construction that the word ‘may’ should be interpreted to mean ‘shall’ when referring to a ‘power given to public officers, and concerns the public interest and the rights of third persons, who have a claim, by right, that the power shall be exercised in this manner.’” *Id.* at 683.

46. In *Steines v. Franklin Co.*, 48 Mo. 167 (1871), the Court wrote: “This principle is founded in justice, and was declared in the early day, that where the rights of third persons are involved, or the public good requires it, the word ‘may’ will always be construed to mean ‘shall.’” *Id.* at 178.

47. In *Kansas City v. J.I. Case Threshing Mach. Co.*, 87 S.W.2d 195 (1935), the Court reaffirmed this line of authority. “A mandatory construction will usually be given the word ‘may’ where public interests are concerned and the public or third persons have a claim de jure that the power conferred should be exercised or whenever something is directed to be done for the sake of justice or the public good.” *Id.* at 931.

48. Section 193.245 squarely fits within this rule, *e.g.*, the term “may” relates to ‘power given to public officers, and concerns the public interest and the rights of third persons.’

49. As such, the term “may” does not provide the Department with discretion to provide such listings, but instead must be construed to mean “shall” provide such listings upon request.

50. Rather, as expressly provided in the Sunshine Law, “[e]xcept as otherwise provided by law, ... all public records of public governmental bodies **shall** be open to the public for inspection and copying.” *See* Mo. Rev. Stat. § 610.011.1-2 (emphasis added).

51. Accordingly, Plaintiffs are entitled under the Sunshine Act to copies of the requested listings.

WHEREFORE, Plaintiffs Brooke Schreier Ganz and Reclaim the Records respectfully request that the Court enter judgment in their favor, finding that Mo. Rev. Stat. § 193.245 does not give DHSS discretion as to whether to provide the requested

listings, and ordering DHSS to provide Plaintiffs Brooke Schreier Ganz and Reclaim the Records with copies of the requested listings, together with such other and further relief as the Court deems just and necessary.

### COUNT III

#### VIOLATION OF THE MISSOURI SUNSHINE LAW – EXORBITANT COSTS

52. Plaintiffs incorporate by reference the allegations of paragraph 1 through 51 as though more fully set forth herein.

53. The Sunshine Law provides that “[f]ees 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.” *See* Mo. Rev. Stat. § 610.026.1(2).

54. Pursuant to the method of calculation set forth in Section 610.026, the actual cost of providing the requested listings is less than \$500, and not the \$1.5 million—or even the \$5,000—estimate provided by DHSS.

55. Specifically, the requested listings can be created with less than two hours of programming time, and the cost of a USB flash drive.

WHEREFORE, Plaintiffs Brooke Schreier Ganz and Reclaim the Records respectfully request that the Court enter judgment in their favor, ordering DHSS to provide Plaintiffs Brooke Schreier Ganz and Reclaim the Records with copies of the requested listings for a total cost of not more than \$500, together with such other and further relief as the Court deems just and necessary.

## COUNT IV

### VIOLATION OF THE MISSOURI SUNSHINE LAW – PENALTY AND ATTORNEY FEES

56. Plaintiffs incorporate by reference the allegations of paragraph 1 through 55 as though more fully set forth herein.

57. The Missouri Sunshine Law provides that a Court may impose civil penalties upon a public governmental body for a knowing or purposeful violation of its obligations to provide access to public records. *See* Mo. Rev. Stat. § 610.027.3.

58. The Missouri Sunshine Law also permits a Court to order a public governmental body to pay all costs and reasonable attorney fees to any party successfully establishing a knowing or purposeful violation. *See* Mo. Rev. Stat. § 610.027.3.

59. DHSS knowingly or purposefully violated the Sunshine Law when it demanded payment of \$1.5 million for copies of the requested listings, when (1) DHSS itself admits the costs is less than \$5,000, and (2) the actual cost to DHSS is less than \$500.

60. DHSS knowingly or purposefully violated the Sunshine Law when it made an untimely and frivolous claim that it has discretion under Mo. Rev. Stat. § 193.425 as to whether to provide the requested listings.

61. Thus, the Court should order DHSS to pay civil penalties and Plaintiffs' costs and attorneys' fees.

WHEREFORE, Plaintiffs Brooke Schreier Ganz and Reclaim the Records respectfully request that the Court enter judgment in their favor, finding that DHSS committed knowing or purposeful violations of the Sunshine Law, and ordering DHSS to pay civil penalties to Plaintiffs Brooke Schreier Ganz and Reclaim the Records, as well

as pay Plaintiffs' costs and attorney fees, and for such other and further relief as the Court deems just and necessary.

Respectfully submitted,

Lathrop & Gage LLP

By: /s/Bernard J. Rhodes

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