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. 16AC-CC00503
vs.	)	
MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES,	)	
Defendant.	)	

SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Brooke Schreier Ganz is entitled to summary judgment on her claims that the Missouri Department of Health and Senior Services knowingly and purposefully violated the Missouri Sunshine Law when DHSS denied her requests for historical birth and death listings, after it agreed to provide the listings to Ms. Ganz if she would pay DHSS $1.49 million—an amount it later changed to $5,174.04. The facts surrounding DHSS' denial are not in dispute.

Instead, the case presents four issues of law:

First, does Section 193.245 of the Missouri statutes "specifically prohibit" the disclosure of the requested listings? Given that Section 193.245 expressly provides that "a listing of persons who are born or who die on a particular date may be disclosed upon request," Section 193.245 plainly does not "specifically prohibit" disclosure of the requested birth and death lists.

Second, even if Section 193.245 were applicable (which it is not), did DHSS waive its right to deny Ms. Ganz's requests on this ground when DHSS did not assert Section

193.245 until nearly six months after it acknowledged receipt of Ms. Ganz's requests? The answer to this question is yes, particularly given that (a) DHSS had previously told Ms. Ganz "[t]he Department is working to fill your request[s]," and (b) DHSS did not deny Ms. Ganz's request until after it received a written plan proposed by the former State Registrar to "not honor the request [and] require them to take you to court."

Third, did DHSS properly calculate the estimated cost to provide the listings? The answer here is obvious, given that one of DHSS' estimates was for $1.49 million, and another was for $1.46 million. But even its later $5,174.04 estimate is flawed, for in arriving at that revised estimate DHSS improperly calculated both the number of hours required to compile the listings, and the applicable hourly rate.

Fourth, did DHSS act knowingly and/or purposefully in denying Ms. Ganz's requests? The answer to this question is, again, obvious, given that discovery has revealed that DHSS adopted a written plan proposed by the former State Registrar to "not honor the request [and] require them to take you to court," and to then take advantage of the delay caused by the lawsuit to try to amend Missouri law to permanently close public access to basic birth and death listing.

For these reasons, Ms. Ganz is entitled to summary judgment. Accordingly, this Court should order DHSS to provide the requested listings at a cost of no more than $500, and should order DHSS to pay both penalties and Ms. Ganz's attorney's fees because of DHSS' knowing and purposeful violations of the Sunshine Law.

I. FACTUAL BACKGROUND

The facts of this case are straightforward … and uncontroverted.

A. DHSS agrees to fill Ms. Ganz's requests for birth and death listings

On Saturday, February 13, 2016, Plaintiff Brooke Schreier Ganz made two Missouri Sunshine Law requests to the Defendant Missouri Department of Health and Senior Services on behalf of Reclaim the Records, a non-profit association of genealogists, historians, researchers, journalists, and open government advocates committed to making genealogical data readily available to the public for free. SOF ¶¶ 1, 12.[1] The first request was for a listing of persons born in Missouri between 1910 and 2015, while the second was for a listing of persons who died in Missouri during the same period. SOF ¶ 13.[2] These listings contain only basic, limited data: the person's given name, the person's surname, and the date of birth or death. SOF ¶ 14. They do not include any of the other personal data that appears on actual birth or death certificates.[3]

On Wednesday, February 17, 2016, Nikki Loethen, the DHSS General Counsel, reviewed the two requests and directed Emily Hollis (also with the Office of General Counsel) to "do the 3-day response." SOF ¶ 15. By "3-day response," Ms. Loethen was referring to the period DHSS had to respond to Ms. Ganz's requests under the Sunshine Law. *See* Mo. Rev. Stat. § 610.023.3 ("Each 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."). SOF ¶ 16.

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1 Citations to "SOF" refer to the Statement of Uncontroverted Facts attached to Plaintiff's Motion for Summary Judgment.

2 Ms. Ganz later limited her request for birth listings to from 1920 through 2015, and limited her request for death listings from 1968 through 2015, per DHSS' recommendation. SOF ¶¶ 24-27.

3 Ms. Ganz's original requests also asked for the person's gender and the certificate number, if it were possible to do so. SOF ¶ 13. However, she later withdrew this part of her requests. SOF ¶ 27.

Later the same day, Ms. Hollis sent two identical e-mails to Ms. Ganz (one in response to each request) and told her, "The Department is working to fill your request." SOF ¶¶ 17-19. She also said that payment of research charges may be required "prior to your receipt of the requested records," and that "the Department may charge $21.38 per hour for research." SOF ¶¶ 18-19.

Ms. Hollis also forwarded the two requests to two employees in DHSS' Division of Community Health and Public Health with directions to "[p]lease begin collection of records." SOF ¶ 20.

Over the next several months, Ms. Ganz exchanged numerous e-mails with Ms. Loethen and Ms. Hollis. SOF ¶¶ 21, 31-39, 43-46. In one such exchange, Ms. Loethen told Ms. Ganz that "[t]he department will charge for staff time … as authorized by Chapter 610, RSMo" (the Missouri Sunshine Law) and that "[t]he department's current hourly rate for staff time is $20.85 per hour." SOF ¶¶ 35-37, 39.

Also during this time, Ms. Ganz spoke with Lois Wambuguh, the acting Bureau Chief for the Bureau of Vital Statistics at DHSS, who informed Ms. Ganz the department's complete birth listings only went back to 1920, and that all the department's death records prior to 1968 had been transferred to the Missouri State Archives. SOF ¶¶ 23-25. Based on Dr. Wambuguh's representations, Ms. Ganz agreed to amend her requests to birth listings from 1920 through 2015, and death listings from 1968 through 2015. SOF ¶ 27.

B. Looking for dirt on Reclaim the Records

On June 15, 2016, Dr. Wambuguh attended a meeting with other members of DHSS' Division of Community and Public Health concerning Ms. Ganz's requests. SOF ¶ 40. Craig Ward, the DHSS State Registrar was invited to attend the meeting, but he was

out of the office and did not return until the next day, June 16, 2016. SOF ¶ 41. The following day, June 17, 2016, Mr. Ward sent a series of e-mails to other State Registrars and contacts at other state and city health departments—all of them located in states where Reclaim the Records had recently been successful in obtaining genealogical records under state open records laws—scheduling phone calls with each of them in an attempt to obtain information about Reclaim the Records. SOF ¶ 42. Mr. Ward did not reach out to Ms. Ganz or Reclaim the Records for any background information or clarification.

C. DHSS' astonishing cost estimate of $1.49 million

On June 24, 2016—less than ten days after the meeting described above, and more than four months after she had told Ms. Ganz "[t]he Department is working to fill your requests"—Ms. Hollis wrote Ms. Ganz and provided a cost estimate "[p]ursuant to your request and Section 610.026, RSMo" (the cost section of the Missouri Sunshine Law.) SOF ¶ 44. The estimate was for an astonishing $1.49 million. SOF ¶ 44.

The estimate included 23,376 hours to prepare the birth listings for 1920-2015, and another 11,688 hours to prepare the death listings for 1968-2015. SOF ¶¶ 44-45. The estimate also provided that the hourly rate being charged was $42.50 an hour—even though Ms. Loethen had previously stated the "current hourly rate for staff time is $20.85" and Ms. Hollis had previously stated "the Department may charge $21.38 per hour for research." SOF ¶¶ 19, 39, 44. The estimate provided no explanation as to how DHSS had arrived at either the number of hours, or the hourly rate. SOF ¶ 44.

On June 28, 2016, Ms. Loethen, wrote Ms. Ganz and said that after the original cost estimate was sent, DHSS realized a mistake had been made in the calculation of the hourly rate, and reduced the hourly rate from $42.50 to $41.78. SOF ¶ 46. Ms. Loethen did not

explain the nature of the mistake. SOF ¶ 46. The change in the hourly rate reduced the total charge by $25,000, from $1.49 million to $1.46 million. SOF ¶ 46.

D. Ms. Ganz retains counsel

Following receipt of the first estimate, Ms. Ganz retained counsel, who reached out to Ms. Loethen concerning the $1.49 million cost estimate. SOF ¶¶ 47-48. During that call, Ms. Loethen explained that the $1.49 million cost estimate was based on separate searches for each day of the two relevant periods, *i.e.*, the 96-year period for the birth listings (1920-2015), and the 48-year period for the death listings (1968-2015). SOF ¶ 48.

In response, Ms. Ganz's counsel stated 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. SOF ¶ 49. Ms. Ganz's counsel also asked for information as to DHSS' computer system, so that he could propose a search methodology consistent with the Sunshine Law. SOF ¶ 50.

A short time later, Ms. Ganz's counsel sent Ms. Loethen an e-mail, explaining how—using the information Ms. Loethen had provided about DHSS' computer system—the listings could be provided by conducting just two searches: one for all birth listings from 1920 to 2015, and another for all death listings from 1968 to 2015. SOF ¶¶ 51-52.

Ten days later, Ms. Loethen responded, writing: "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." SOF ¶¶ 53-54.

On August 1, 2016, Ms. Loethen sent Ms. Ganz's counsel an e-mail dramatically revising the previous cost estimate from $1.46 million to just over $5,000. SOF ¶¶ 55-56. In her e-mail, Ms. Loethen explained the difference between the two estimates by stating: "Staff has determined they can run the lists for one year at a time versus one day at a time as originally estimated." SOF ¶¶ 56-57. She stated "[t]he original estimate was based on a misunderstanding regarding what the statute allows in terms of providing a list for a particular date." SOF ¶ 56.

Ms. Loethen also stated she had asked DHSS staff to research whether it was possible—as Ms. Ganz's counsel had suggested—to run all the years in one search. SOF ¶¶ 56, 58. Ms. Loethen stated that if staff reported such a search could not be run, "I have asked them to explain why." SOF ¶¶ 56, 58. Finally, she told Ms. Ganz's counsel, "I will let you know what I find out." SOF ¶¶ 56, 59.

E. The secret plan to deny Ms. Ganz's request

On July 21, 2016—after Ms. Ganz's counsel had pushed back against the $1.46 million cost estimate—Dr. Wambuguh spoke with Garland Land, the former Missouri State Registrar, about Ms. Ganz's requests. SOF ¶¶ 60. Later the same day, Mr. Land wrote Dr. Wambuguh and urged her to "not honor the request" and "require them to take you to court." SOF ¶ 61. He also said that "[b]y delaying this you might file a regulation or get the Legislature to clarify the intent of the law." SOF ¶ 61. The next day, Dr. Wambuguh wrote Mr. Land and advised him that she would "share … this useful advice … with my colleagues." SOF ¶ 62.

F. DHSS executes the secret plan – Part 1

Exactly two weeks later, on August 9, 2016, Ms. Loethen wrote Ms. Ganz's counsel and—rather than answering whether it was possible to run a date-range search encompassing the data from all the years in one search request, as she stated she would do in her August 1st e-mail—advised him that DHSS was denying both the request for birth listings and the request for death listings, and was refusing to provide either listing. SOF ¶ 63.

The decision to deny Ms. Ganz's requests had been made the day before, on August 8, 2016—two weeks after Mr. Land's e-mail advising DHSS to "not honor the request [and] require them to take you to court." SOF ¶ 64.

The decision to deny Ms. Ganz's requests came nearly six months after Ms. Ganz made her requests. SOF ¶¶ 64-65.

G. DHSS executes the secret plan – Part 2

On August 22, 2016, less than two weeks after DHSS denied Ms. Ganz's requests, Mr. Ward—who previously had sought information from his contacts at other health departments about Reclaim the Records—sent a follow-up e-mail to those contacts and advised them that DHSS had denied Ms. Ganz's requests. SOF ¶ 66. He also advised them that not only had DHSS denied Ms. Ganz's request, but that DHSS had also "submitted a legislative request to rescind the particular statute." SOF ¶ 67. Mr. Ward ended his e-mail by writing: "I'm hoping that's the end of it." SOF ¶ 68.

This, of course, is exactly what Mr. Land had proposed one month earlier, *i.e.*, "require them to take you to court …. By delaying this you might file a regulation or get the Legislature to clarify the intent of the law." SOF ¶ 75.

H. Ms. Ganz's counsel responds

On August 24, 2016, Ms. Ganz's counsel sent Ms. Loethen an 11-page letter advising her that (a) DHSS' reversal of position was contrary to the Missouri Sunshine Law, and (b) Ms. Ganz intended to pursue litigation—and to seek penalties and attorney's fees for DHSS' purposeful violation of the Sunshine Law—unless DHSS provided the requested records at actual cost. SOF ¶ 69.

When Ms. Loethen failed to respond to the letter, Ms. Ganz filed the instant suit on November 23, 2016. SOF ¶ 70; Petition.

I. DHSS executes the secret plan – Part 2 (continued)

As stated in August 22, 2016, e-mail, Mr. Ward's e-mail, DHSS did in fact go to the Missouri Legislature and ask it to amend Missouri law to close birth and death listings altogether. SOF ¶¶ 66-67, 71. Specifically, DHSS lobbied to have the Missouri Legislature remove the provision in Section 193.245 that provides that birth and death listings are available upon request. SOF ¶ 72.

To date, DHSS' attempt to amend Missouri law to close birth and death listings has failed. SOF ¶ 73. DHSS, however, is considering additional steps to convince the Missouri Legislature to amend Missouri law to close birth and death listings. SOF ¶ 74.

J. DHSS' past practice was to regularly provide birth/death listings

Before DHSS denied Ms. Ganz's requests, it regularly provided birth and death listings. SOF ¶ 76. In fact, in just the three years before Ms. Ganz made her requests, DHSS provided somewhere between 50 and 100 such listings to various other requesters. SOF ¶ 77. These listings included the first name, last name, and date of birth or death of every person who was born or died in Missouri on a given date. SOF ¶ 78. If the request asked

for more than one date, the listing would provide the same information for each date of the request. SOF ¶ 79. DHSS placed no restrictions on the use of these listings. SOF ¶ 80.

K. DHSS has stopped providing birth and death listings

Since DHSS denied Ms. Ganz's requests, it has stopped providing birth and death listings, while it seeks to convince the Missouri Legislature to close such listings. SOF ¶ 81.

L. DHSS' hourly charges are double the "average hourly rate of pay"

The Missouri Sunshine Law provides that a public governmental agency may charge for staff time to produce records maintained on computer facilities. SOF ¶ 89. 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). SOF ¶ 90.

DHSS' General Counsel knows this is the law, for in her May 27, 2016, e-mail to Ms. Ganz, Ms. Loethen wrote: "The department will charge for staff time … as authorized by Chapter 610, RSMo." SOF ¶ 39. She also wrote that "[t]he department's current hourly rate for staff time is **$20.85** per hour." SOF ¶ 39.

Remarkably, however, when Ms. Hollis, from DHSS' General Counsel's Office, provided the $1.49 million cost estimate, she used an hourly rate of **$42.50**—despite expressly stating that the cost estimate was "[p]ursuant to your request for an estimate and Section 610.026, RSMo." SOF ¶ 44. Later, Ms. Loethen said a mistake had been made in calculating the hourly rate, and reduced it by 72¢ an hour to **$41.78**. SOF ¶ 46. Still later, Ms. Loethen used this same **$41.78** in her $5,107.34 estimate. SOF ¶ 56.

We now know that none of those numbers are correct, for discovery has revealed that DHSS (a) miscalculated the "average hourly rate of pay," and then (b) made numerous additions to that miscalculated base rate.

As its name suggests, the "average hourly rate of pay of staff" is an average of the rate of pay of the staff who would need to perform the work necessary to respond to the request. DHSS' authorized representative testified in her deposition that the proper way to calculate this rate is to first determine the average rate of pay of the three relevant job classifications, and then average those three numbers. SOF ¶¶ 93-94. Specifically, she testified that "we would take the average of each of those three ranges and then average that." SOF ¶ 94. Doing that, the average hourly rate of pay would be $17.63. SOF ¶ 95.

DHSS, however, began its computation by starting with an average hourly rate of $22.61. SOF ¶ 96. DHSS arrived at its average hourly rate of $22.61 by taking the "average" and the "maximum" rate of pay of the highest paid class and averaged those numbers. SOF ¶ 96. But that is plainly wrong for two reasons. First, it is not an average of the total range of pay for staff in that classification, but is an average of the average rate and the highest rate of pay. Second, it completely ignores the average hourly rates of pay for the two other (and cheaper) job classifications.

Then, to add insult to injury, DHSS then improperly padded this already-inflated hourly rate by adding a fringe benefit factor, and "indirect allocation" factor, a network charge, and a server charge. SOF ¶¶ 97-98, 100-102. The total of these charges equals the $41.78 hourly rate DHSS is attempting to collect, as shown below:

Actual hourly rate	$22.61
Fringe benefits	$10.70
Indirect allocation	$6.96
Network charge	$0.93

Server charge	$0.58
Total	**$41.78**

SOF ¶ 102.

None of these charges are allowed by the statute, which provides that fees charged by the agency "shall include **only** the cost of … staff time, which shall not exceed the average hourly rate of pay of staff." Mo. Rev. § Stat. 610.026.1(2) (emphasis added). SOF ¶ 90.

M. The actual cost of producing the listings

DHSS' last cost estimate of $5,174.04 was based on searches for one year at a time. SOF ¶ 104. Specifically, the estimate for the birth listings was based on 96 separate searches (for each of the years 1920 through 2015) at an estimated time per search of .75 hours, while the estimate of the death listings was based on 48 separate searches (for each of the years 1968 through 2015) at an estimated time per search of 1.08 hours. SOF ¶ 105.

In Ms. Loethen's e-mail forwarding this estimate, she stated that she had asked staff to determine whether it was possible to run all the years at one time (as opposed to one year at a time), and that she was waiting for an answer to that question. SOF ¶ 106. Ms. Loethen never advised as to whether it was possible to run all the years at one time (SOF ¶ 107), but in the deposition of the authorized DHSS representative, the representative stated that DHSS did not try to run anything other than a one-year search. SOF ¶ 108. The representative speculated, however, that she did not believe it was possible to run a ten-year search and, accordingly, believed that an effective search would be somewhere between one year and ten years. SOF ¶¶ 109-110.

If Ms. Loethen 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). SOF ¶ 111. Similarly, if Ms. Loethen had used a five-year search period, 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). SOF ¶ 111.

If Ms. Loethen had used the actual "average hourly rate of pay for staff" of $17.63, 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). SOF ¶ 112. And if Ms. Loethen had used the actual "average hourly rate of pay for staff" of $17.63, 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). SOF ¶ 112.

As such, 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. SOF ¶ 113.

II. ARGUMENT

"Missouri's Rule 74.04 sets out a procedure for granting summary judgments in cases in which the movant can establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law." *ITT Commercial Finance Corp. v. Mid-America Marine Supply Co.*, 854 S.W.2d 371, 377 (Mo. banc 1993).

A plaintiff's motion for summary judgment is reviewed under the same standard as a motion for summary judgment filed by a defendant. That is, the plaintiff is entitled to summary judgment if she can show there is no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law. *See Niswonger v. Farm Bureau Town*

& Country Ins. Co., 992 S.W.2d 308, 312 (Mo. App. – S.D. 1999) (affirming summary judgment on plaintiff's motion).

A. Birth and Death Listings are Open Records Under the Sunshine Law

The Missouri Sunshine Law states simply: "Except as otherwise provided by law, … all public records of public governmental bodies shall be open to the public for inspection and copying." Mo. Rev. Stat. § 610.011.2. As such, Sunshine Law issues are settled by the answers to three questions: (1) is the requested document "of [a] public governmental bod[y]," (2) is the requested document a "public record," and (3) is the record "otherwise [closed] by law."

1. DHSS is a "Public Governmental Body"

The Missouri Sunshine Law defines a "public governmental body" as a "department or division of the state." Mo. Rev. Stat. § 610.010(4)(c). The Missouri **Department** of Health and Senior Services is, by definition, a "department" of the State of Missouri. *See* Mo. Rev. Stat. § 192.005 ("There is hereby created and established as a department of state government the 'Department of Health and Senior Services.'").

As such, there is no question DHSS is a "public governmental body" under the Sunshine Law.

2. Birth and Death Listings are "Public Records"

The Sunshine Law defines a "public record" as "any record, whether written or electronically stored, retained by or of any public governmental body." Mo. Rev. Stat. § 610.010(6). It is clear that listings of persons who were born and died in Missouri are records that are stored and retained by the Missouri Department of Health and Senior Services.

Specifically, the Missouri statutes define "vital statistics" as "data derived from certificates and reports of birth [and] death" and provide that "[t]he [D]epartment [of Health and Senior Services] shall establish an office which shall install, maintain and operate the only system of vital statistics throughout the state. The office shall provide for the preservation of its official records." Mo. Rev. Stat. §§ 193.015(14) & 193.025.

Again, therefore, there is no question the birth and death listings that Ms. Ganz requested are "public records" under the Sunshine Law.

3. Birth and Death Listings are not "Otherwise [Closed] By Law"

Under the Missouri Sunshine Law, government records are open to the public "except as otherwise provided by law." Mo. Rev. Stat. § 610.011.2. The Missouri Supreme Court has interpreted this phrase to mean "except as otherwise provided by statute." *Yates v. Casteel*, 329 Mo. 1101, 49 S.W.2d 68, 69 (1932).

Section 610.011 provides that "[i]t is the public policy of this state that … records … of public governmental bodies be open to the public" and that "exceptions [be] **strictly construed** to promote this public policy." Mo. Rev. Stat. § 610.011.1 (emphasis added); *Scroggins v. Missouri Dep't of Soc. Servs.*, 227 S.W.3d 498, 500 (Mo. App. - W.D. 2007) ("Statutory exceptions allowing records to be closed are to be strictly construed.").

Records are therefore open for inspection under the Sunshine Law unless another statute "**specifically prohibit**[**s**] public inspection" of them. *Oregon County R-IV School Dist. v. LeMon*, 739 S.W.2d 553, 557 (Mo. Ct. App. - S.D. 1987) (emphasis added); *see Pulitzer Pub. Co. v. Mo. State Employees' Ret. Sys.*, 927 S.W.2d 477, 481 (Mo. Ct. App. - W.D. 1996) (relying on *LeMon* to reject state agency's contention that records were closed pursuant to Mo. Rev. Stat. § 610.021(14)).

a. Section 193.245 Does Not "Specifically Prohibit" Disclosure of Birth and Death Listings Under the Sunshine Law

Six months after Ms. Ganz made her request for the birth and death listings, DHSS denied both requests, citing to Section 193.245(1) of the Missouri Revised Statutes. SOF ¶¶ 63, 65. 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;

Mo. Rev. Stat. § 193.245(1) (emphasis added).

The question before this Court, therefore, is whether Section 193.245 "specifically prohibits" the disclosure of birth and death listings.

In answering that question, this Court should be guided by the principle that "[s]tatutory interpretation is a question of law," and the rule that "words used in the statute are to be considered in their plain and ordinary meaning." *Pulitzer*, 927 S.W.2d at 482.

Here, Section 193.245(1) states on its face that "listing[s] of persons who are born or who die on a particular date **may be disclosed** upon request." As such, it is obvious from the plain meaning of the words used in the statute that it does not "specifically prohibit" disclosure of birth and death lists.

This conclusion is well-supported by the *LeMon* decision. There, a local school district denied LeMon's Sunshine Law request for a listing of the names, addresses, and telephone numbers of all students in the district. *LeMon*, 739 S.W.2d at 554. The district

claimed that disclosure of the names, addresses and phone numbers was prohibited by several statutes, including Section 171.151—which had previously contained the statement that school "register[s] shall be open to the inspection of the public at all times," but which the Legislature later removed. The district argued that the removal of this sentence indicated that these records were to be closed to the public *Id.* at 557.

The Missouri Court of Appeals disagreed, writing that while it was true that the then-current version of Section 171.151 did not specifically require that the register be open, "[i]t is also true, however, that in its present form § 171.151 **does not specifically prohibit** public inspection of the register." *Id*. This latter fact, the court explained, was dispositive because "[t]he mandate of § [610.011] is that public records be open to the public for inspection and duplication unless a statute prohibits their disclosure." *Id*.

The school district also argued that the information was closed by reasons of regulations under the Federal Educational Rights and Privacy Act. Those regulations provided that "[a]n educational agency or institution **may** disclose directory information if it has given public notice" of its intent to do so. 39 C.F.R. § 99.37(a) (emphasis added). The school district argued that while the regulations provide that directory information "may" be disclosed, "[t]he federal law and the federal regulations do not *require* disclosure of directory information." 739 S.W.2d at 558-59.

Again, the court squarely rejected the school district's argument, stating: "There is no merit to this argument." *Id*. at 559. "The federal statute, and the regulations implementing it, permit disclosure of the requested information …. Thus, … the trial court properly required disclosure because of the general mandate of § [610.011] and because [FERPA], under the circumstances here, did not bar disclosure." *Id*.

The same is true here. Even under DHSS' interpretation of Section 193.245(1), disclosure of birth and death listings are not "specifically prohibit[ed]" by the law—they are merely "discretion[ary]." Specifically, DHSS asserts in its denial letter that Section 193.245(1) gives it "discretion" to grant—or deny—a request for birth and death listings and that "the department has opted to **exercise the discretion granted in Section 193.245(1)**, RSMo, to decline these requests." SOF ¶ 63 (emphasis added). Because DHSS concedes Section 193.245 gives it "discretion" to release the listing, it plainly does not "specifically prohibit" its disclosure.

Moreover, DHSS admits it has "regularly" disclosed birth and death listings for many years. SOF ¶ 76. Specifically, in the three years before Ms. Ganz made her requests, DHSS provided birth and death listings in response to between 50 to 100 different requests. SOF ¶ 77.

As such, DHSS concedes that Section 193.245(1) does not meet the "specifically prohibit" disclosure standard of *Pulitzer* and *LeMon*. To find otherwise, *i.e.* that Section 193.245 specifically prohibits disclosure of the birth and death listings against the plain language of the statute, would effectively give "too much scope" to Section 193.245 and "insufficient scope" to Section 610.011, which requires that public records shall be open to the public for inspection and duplication unless their production is "specifically prohibited." *LeMon,* 739 S.W.2d at 556.

Because disclosure of birth and death listings under Section 193.245 is **not** specifically prohibited, the Missouri Sunshine Law mandates they be open to the public.

b. Section 193.245's Use of the Term "May Be Disclosed" Does Not Give DHSS Discretion as to Whether to Release Birth and Death Listing

Not only does Section 193.245 not specifically prohibit disclosure of birth and death listings, DHSS is wrong in asserting that the statute's use of the term "may be disclosed" gives it discretion to withhold those records.

Any reasonable interpretation of Section 193.245(1) 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." In other words, the term "may be disclosed" means simply that DHSS has legal authority to disclose those listings without violating the Act; the use of the term "may be disclosed" does not, in any way, grant Defendant "discretion" to arbitrarily release—or not release—a listing of births or deaths.

DHSS' assertion that Section 193.245(1) gives it the discretion to not release birth or death listings by use of the word "may" is plainly refuted by Missouri law. Where the use of the word "may" is used in connection with the powers of the state or concerns of the public interest, "may" is interpreted to mean mandatory. In *State ex rel. Vernon County v. King*, 36 S.W. 681 (Mo. 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. In *Steines v. Franklin Co.*, 48 Mo. 167 (1871), the Court wrote: "This principle is founded in justice, and was declared in an 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 (emphasis added).

In *Kansas City v. J.I. Case Threshing Mach. Co*., 87 S.W.2d 195 (Mo. banc 1935), the Court reaffirmed this line of authority. "A mandatory construction will usually be given to 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 (internal quotations omitted).

The legislature's use of the word "may" in Section 193.245(1) plainly fits within this rule, *i.e.* the term "may" relates to 'power given to public officers, and concerns the public interest and the rights of third persons.' The term "may" simply means DHSS has the authority to release birth and death listings, notwithstanding the fact other vital records (specifically including the actual birth and death certificates—as opposed to the mere listings) are closed.

This construction is made even more clear by the full sentence: "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**." Mo. Rev. Stat. § 193.245(1) (emphasis added). As can be plainly seen, the statute expressly provides that "the name and the date of such birth or death **shall** be disclosed."

As such, the term "may" does not provide DHSS with discretion as to whether it will—or will not—provide such listings; instead, it must be construed to mean "shall" provide such listings upon request.

This conclusion is buttressed by the fact that when the Legislature intends to give an agency discretion to close—or release—a record, it does so expressly. For example, in

Section 210.150, the Legislature provided that records of the Children's Division of the Department of Social Services are closed. *See* Mo. Rev. Stat. § 210.150.1 ("[t]he children's division shall ensure the confidentiality of all reports and records"). However, in subsection 5, the Legislature expressly granted the DSS Director discretion to release records in the case of a child fatality or near fatality. Specifically, the statute reads as follows: "Nothing in this section shall preclude the release of findings or information about cases which resulted in a child fatality or near fatality. **Such release is at the sole discretion of the director** of the department of social services, based upon a review of the potential harm to other children within the immediate family." *See* Mo. Rev. Stat. § 210.150.5.

By contrast, Section 193.245 contains no such language—neither in terms of granting DHSS discretion, or directing who within DHSS has such discretion, or what factors to consider in exercising that discretion. This is still another reason why Section 193.245 should not be read to give DHSS discretion. *See* 2B SUTHERLAND STATUTORY CONSTRUCTION § 53:3 (7th ed. 2018) ("by transposing the clear intent expressed in one or several statutes to a similar statute of doubtful meaning, courts are able to give effect to the probable legislative intent").

c. This Court Should Grant Summary Judgment as to Count II

DHSS improperly relied on the "discretion" allegedly granted to it under Section 195.245(1) to deny requests for birth and death listings. Not only does Section 195.245(1) not give DHSS discretion, it is not a valid exemption under the Missouri Sunshine Law because it plainly does not "specifically prohibit" disclosure. As such, there is no genuine issue of material fact that DHSS relied on an invalid claim of exemption in denying Ms. Ganz's Sunshine Law requests for a listing of birth and death records.

Accordingly, this Court should grant summary judgment on Count II of Ms. Ganz's Petition, which seeks (1) a declaration that Section 193.245 does not constitute a valid exemption under the Missouri Sunshine Law, and (2) an order requiring DHSS to provide the requested birth and death listings.

B. DHSS Waived any Right to Claim an Exemption under Section 193.245

Even if this Court were to determine that Section 193.245(1) is a valid exemption to the Missouri Sunshine Law, there is no genuine dispute of material fact that DHSS waived the right to rely on any statutory exemption by failing to deny the request or assert an exemption within three days.

The Missouri Sunshine Law provides that "[e]ach 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." Mo. Rev. Stat. § 610.023.3. While the Sunshine Law provides that the "period for document production may exceed three days for reasonable cause," *id*., it contains no such provision for extending the time for a public governmental body to deny a request. In other words, any denial of a request must be made within three business days.

This Court has previously held that where, as here, a public governmental body fails to deny a claim—or fails to provide a valid reason for a denial within three days—the governmental body waives the right to later claim an exemption under the Sunshine Law. "[T]he Defendant is prohibited from asserting, and this Court will not consider, any of the *post hoc* justifications for its denial and will consider only those it stated in its three initial denial letters." *See* Amended Order and Judgment at 12, *Malin v. Cole Cty. Prosecuting*

Attorney, No. 15AC-CC00573 (Cole Cty. Cir. Ct. Mar. 8, 2018), *aff'd*, No. WD 81583, 2019 WL 189158, at *5 (Mo. App. - W.D. Jan. 15, 2019).

Here, there is no question that DHSS made no claim of exemption within the statutory three-day deadline. Ganz made her requests for birth and death listings on Saturday, February 13, 2016. SOF ¶¶ 12-13. DHSS acknowledged receipt of Ms. Ganz's requests on Wednesday, February 17, 2016, within the three-business-day-period allowed by the Sunshine Law. SOF ¶¶ 15, 17, 19.

In its acknowledgment, DHSS did not (1) deny either of Ms. Ganz's requests, nor (2) claim any exemption under the Sunshine Law. SOF ¶ 19. Quite the contrary, it stated that "[t]he Department is working to fill your request" and advised Ms. Ganz that payment of research and copy charges may be required "prior to your receipt of the requested records." SOF ¶¶ 18-19.

Over the next six months, DHSS communicated with Ms. Ganz and her counsel about the requests. During that time DHSS repeatedly referenced the cost provisions of the Sunshine Law, but never referenced any claimed exemption. For example, on May 27, 2016, DHSS' General Counsel wrote Ms. Ganz and stated DHSS was preparing a cost estimate, and that the estimate would include "charge for staff time (and programmer time if necessary) as authorized by Chapter 610, RSMo," the Missouri Sunshine Law. SOF ¶ 39. On June 24, 2016, when DHSS issued its $1.5 million cost estimate, it stated the estimate was "[p]ursuant to … Section 610.026," the cost provision of the Missouri Sunshine Law. SOF ¶ 44.

Nor did DHSS claim any exemption under Section 193.245. Rather, after Ms. Ganz (through her counsel) objected to the $1.5 million cost estimate, DHSS' General Counsel

wrote that DHSS staff was investigating whether "**lists compliant with Section 193.245** could be created in fewer hours, thereby reducing the cost estimates." SOF ¶ 54 (emphasis added). DHSS' General Counsel then followed up with a new reduced cost estimate of approximately $5,000. SOF ¶¶ 55-56. At no point did DHSS communicate that the lists requested were not compliant with Section 193.245; rather, the DHSS General Counsel expressly represented that the $5,000 cost estimate was for "**lists compliant with Section 193.245.**" SOF ¶ 54 (emphasis added).

DHSS did not claim any exemption until August 9, 2016—nearly six months after the requests were submitted. SOF ¶¶ 63-65. During those six months DHSS repeatedly told Ms. Ganz it was "working to fulfill your request[s]" to provide "lists complaint with Section 193.245. SOF ¶¶ 18-19, 54. In fact, from the time the request was made until the time the request was denied, all of DHSS' communications indicated it *would* produce the requested birth and death lists, *for a price.* It was only after Ms. Ganz (through her counsel) challenged the exorbitant fees DHSS was seeking did DHSS deny Ms. Ganz's request.

Permitting state agencies like DHSS to operate in this way—*i.e.* assert no exemption or denial and respond as if the request will be fulfilled until finally denied six months later—would "render[] superfluous the statutory requirement of notice of the reasons for denial" contained in the Sunshine Law, *see ACLU of E. Mo. Fund v. Missouri Dep't of Corr*., Case No. 12AC-CC00692 (Cole Cty. Cir. Ct. June 23, 2014), and would be contrary to Missouri's policy of providing "open government and transparency." *Laut v. City of Arnold,* 417 S.W.3d 315, 318 (Mo. App. - E.D. 2013).

Accordingly, even if DHSS had a basis to claim a valid statutory exemption—which it plainly does not—DHSS waived any such right to an exemption by not asserting

it until nearly six months after it first received Ms. Ganz's Sunshine Law requests and after repeated exchanges of correspondence with DHSS' representatives who failed to make any reference whatsoever to any exemption.

Because there is no dispute that DHSS failed to deny—or give a valid reason to deny—either of Ms. Ganz's requests until six months after it received those requests, DHSS waived the right to rely on any statutory exemption, and Ms. Ganz is entitled to summary judgment on Count I, which seeks a declaration that DHSS waived any right to withhold documents by failing to comply with Mo. Rev. State. § 610.023.4.

C. DHSS Violated the Sunshine Law by Charging Exorbitant Fees

DHSS violated the Missouri Sunshine Law not just by denying Ms. Ganz's requests, but—before that—by demanding exorbitant fees from Ms. Ganz. Those fees were improper for two reasons. First, the hourly rate charged by DHSS was nearly double the rate allowed under the Sunshine Law. Second, the hours charged—even after DHSS dropped its estimate from $1.49 million to just over $5,000—are excessive.

1. DHSS charged nearly double the allowable hourly rate

The Missouri Sunshine Law provides that a governmental agency may charge for staff time to produce records maintained on computer facilities. 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).

There are two problems with DHSS' hourly rate calculation. First, it used the wrong "average hourly rate of pay for staff." According to the deposition testimony of DHSS'

authorized representative, the proper way to calculate the "average hourly rate of pay for staff" was to first determine the average rate of pay for the three job classifications of persons who would do the work responding to the requests, and then average those three averages. SOF ¶¶ 92-94. Specifically, she testified that "we would take the average of each of those three ranges and then average that." SOF ¶ 94.

Rather than do that, however, DHSS took the average and the maximum rate of pay of the highest paid class and averaged those numbers to come up with an hourly rate of $22.61. SOF ¶ 96. But that is plainly wrong. When the average hourly rate of pay is calculated using the method described by the DHSS representative in her deposition, *i.e.*, averaging the average of all three job classifications, the "average hourly rate of pay of staff" is $17.63. SOF ¶ 95. This is the base rate that DHSS should have used.[4]

Despite the clear language of the statute that DHSS can "only" charge "the hourly rate of pay for staff of the public governmental body," DHSS has charged nearly double that amount. Specifically, DHSS' own calculations show that DHSS improperly made several additions to the actual "the hourly rate of pay," as shown below:

Actual hourly rate	$22.61
Fringe benefits	$10.70
Indirect allocation	$6.96
Network charge	$0.93
Server charge	$0.58
Total	**$41.78**

SOF ¶¶ 97-103. These charges are plainly improper.

[4] DHSS, of course, is bound by the deposition testimony of its authorized representative. *See State ex rel. Reif v. Jamison*, 271 S.W.3d 549, 551 (Mo. banc 2008) (statements made by the witness [are] binding on the corporate party").

"The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language." *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013) (citing *State v. Graham*, 204 S.W.3d 655, 656 (Mo. banc 2006)). Here, the terms of the statute are clear.

First, it says that the fees charged "shall include **only**" the charges listed. The term "only" has a clear meaning—it means DHSS cannot add charges that are not included in the statute.

Second, the statute says DHSS may charge "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." Again, these terms have clear meanings. To begin with, the term "pay" means "something paid for a purpose and especially as a salary or wage."[5] In accord with that definition, the term "rate of pay" means "the amount of money workers are paid per hour, week, etc."[6] As such, the amount of money workers are paid is their hourly wage. In this case, that wage is reflected in DHSS' own workpapers as the "direct PS rate," where "PS" stands for "Pay Scale." SOF ¶ 98.

The term "fringe benefit," on the other hand, has a completely different meaning. Specifically, a "fringe benefit" is "an employment benefit (such as a pension or a paid holiday) granted by an employer that has a monetary value but **does not affect basic wage rates**."[7] (Emphasis added). As such, fringe benefits are not included in a "rate of pay."

[5] https://www.merriam-webster.com/dictionary/pay.

[6] https://www.merriam-webster.com/dictionary/rate%20of%20pay.

[7] https://www.merriam-webster.com/dictionary/fringe%20benefit.

This is not just Ms. Ganz's view, this is the view of the Missouri Court of Appeals-Western District. In *Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Missouri*, 912 S.W.2d 574 (Mo. App. - W.D. 1995), the court was faced with the question whether the term "salary rate" included fringe benefits. In finding that the term did not, the court explained, "Fringe benefits, such as health insurance, are '[s]ide, non-wage benefits which accompany or are in addition to a person's employment such as paid insurance, recreational facilities, sick leave, profit-sharing plans, paid holidays and vacations, etc. Such benefits are in addition to regular salary or wages[.]'" *Id*. at 576 (quoting BLACK'S LAW DICTIONARY 667–68 (6th ed. 1990)). Accordingly, held the court, "fringe benefits are not properly included in the term 'salary rate.'" *Id*.

The same is true here, *i.e.*, fringe benefits are not properly included in the term "rate of pay."

Similarly, the "indirect allocation" with DHSS has added to the hourly rate, along with the "network charge" and "server charge" are not, under any meaning of the term "rate of pay," properly included.

Accordingly, DHSS violated the Sunshine Law when it charged Ms. Ganz $41.78 an hour, when the only allowable charge was the "average hourly rate of pay for staff of the public governmental body required for making copies and programming," which is $17.63.

2. DHSS charged for excessive hours

Not only did DHSS charge an excessive hourly rate, it also attempted to collect for excessive hours—beginning with its effort to collect for 23,376 hours to prepare the birth

listings, and another 11,688 hours to prepare the death listings. SOF ¶¶ 44-45. DHSS justified these charges be asserting that they were "per day" charges (SOF ¶ 48) —which it rationalized because Section 193.245 provides that a "listing of persons who [we]re born or who die[d] on a particular day may be disclosed upon request." Mo. Rev. Stat. § 193.245.

But the Sunshine Law does not allow such "unit" charges—instead, it only allows recovery of the actual time spent to gather the records. The most apposite case in this regard is *R.L. Polk & Co. v. Missouri Dep't of Revenue*, 309 S.W.3d 881, 885 (Mo. App. - W.D. 2010). There, the court of appeals rejected the Department of Revenue's argument that it could charge a "per record" fee for electronic copies of driver's licenses. Instead, the court found that the department was limited to recovery of the actual time necessary to provide the electronic copies, per Section 610.026.1(2). *Id*.

In so doing, the court held that "in the context of electronic records, a flat per record fee would not properly take into account the costs the statute authorizes the Department to include in its fee." *Id*. "Where the records are transferred electronically to the Companies, the number of records requested does not necessarily correspond to the cost to the Department in terms of staff time and the cost to transfer the records." *Id*.

Because of this, the court noted it is irrelevant that "the Department may incur the same cost in responding to a request for all of its records as it would in responding to a request for only ten records" because "the Department would not incur any further costs simply due to the difference in the number of records requested." *Id*. at 885-86.

The same is true here. A charge "per record"—in this case, per day—is plainly improper; instead, DHSS can only charge for the actual time spent producing electronic copies of the birth and listings in gross—not per day.

This is not a surprise to DHSS, for after it proffered its $1.49 million invoice, it put forth a $5,000 estimate—based on annual (vs daily) searches. SOF ¶¶ 55-56. But DHSS has failed to explain why it can't perform searches on more than an annual basis. SOF ¶¶ 58, 106-107.

This failure is particularly flagrant considering Ms. Loethen's August 1, 2016, e-mail in which she expressly said she had asked staff to advise whether it was possible to run all the years at one time. SOF ¶ 58. While we don't know what staff told Ms. Loethen, we know from the deposition of DHSS' authorized representative that she believes that it is possible to run the searches for somewhere between one- and ten-year periods. SOF ¶¶ 107, 109-110.

3. The allowable charges are $583.34

Based on this information, it is possible to calculate the cost of providing the two listings. Specifically, if one assumes the mid-point of the one- to -ten-year periods, *i.e.*, five 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). SOF ¶ 111. Similarly, if one uses the same five-year search period, 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). SOF ¶ 111.

Using these hours—and the actual "average hourly rate of pay for staff" of $17.63 (*See supra* Part C.1.)—the total cost of providing the birth listings by using five-year search increments would be $264.45 (15 hours x $17.63 an hour). SOF ¶ 112. And the cost of providing the death listings would be $190.40 (10.8 hours x $17.63 an hour). SOF ¶ 112.

Accordingly, the combined total for both listings would be $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.** SOF ¶ 113.

Summary judgment is therefore appropriate on Count III of Ms. Ganz's Petition, which alleges that DHSS violated the Sunshine Law by charging exorbitant fees. Specifically, summary judgment should be granted in Ms. Ganz's favor and DHSS should be ordered to provide Plaintiffs the requested listings for a total cost of not more than $454.85.

D. DHSS Knowingly and Purposely Violated the Sunshine Law

The Missouri Sunshine Law provides that a defendant who "knowingly" violated the law "shall" pay a civil penalty of up to $1,000, and "may" be ordered to pay the plaintiff's attorney's fees and costs. *See* Mo. Rev. Stat. § 610.027.3. It further provides that a defendant who "purposely" violated the law "shall" pay a fine of up to $5,000, and "shall" pay the plaintiff's attorney's fees and costs. *See* Mo. Rev. Stat. § 610.027.4. "What constitutes a knowing or purposeful violation of the Sunshine Law is a question of law." *ACLU of Missouri Found. v. Missouri Dep't of Corr*., 504 S.W.3d 150, 153 (Mo. App. - W.D. 2016).

1. DHSS committed a knowing violation of the Sunshine Law

"[A] knowing violation requires that the public governmental body had actual knowledge that the Sunshine Law required production but did not produce the document." *Laut v. City of Arnold*, 491 S.W.3d 191, 200 (Mo. banc 2016). Thus, where the defendant knew that a settlement agreement was a public record—but withheld it because the agreement contained an express confidentiality clause—the defendant committed a knowing violation.

> The public entity in that case, Robinwood, admitted it knew that settlement agreements generally are open records but failed to produce the settlement agreement requested in that case because it was concerned that disclosure would breach the settlement agreement itself, which contained a confidentiality clause. It, therefore, chose not to produce the settlement agreement so as not to violate the confidentiality clause.

Id. at 199 (describing *Strake v. Robinwood W. Cmty. Improvement Dist.*, 473 S.W.3d 642 (Mo. banc 2015)).

The same is true here. DHSS knew that Ms. Ganz's requests fell within the Sunshine Law. This fact is obvious from numerous actions DHSS—through its Office of General Counsel—took in response to Ms. Ganz's request. First, Ms. Loethen instructed Ms. Hollis to "do the 3-day response." SOF ¶¶ 15-16. Second, Ms. Hollis responded to Ms. Ganz within the three-day-period set forth in the Sunshine Law. SOF ¶¶ 15, 17. Third, Ms. Loethen told Ms. Ganz that "[t]he department will charge for staff time … as authorized by Chapter 610" which, of course, is the Missouri Sunshine Law. SOF ¶¶ 36-37, 39. Fourth, when Ms. Hollis provided the cost estimate for providing the requested records, she expressly stated that the estimate had been prepared "[p]ursuant to your request and Section 610.026, RSMo"—the cost section of the Missouri Sunshine Law. SOF ¶ 44.

Despite this knowledge, when Ms. Loethen issued her letter denying Ms. Ganz's request she made no mention of the Sunshine Law—and, therefore, made no effort whatsoever to claim any legitimate exemption under the Sunshine Law. That's because she knew she had no valid exemption under the Sunshine Law.

Instead, she cited Section 193.245 as the basis of her denial. But the timing of the denial—coming nearly six months after the requests were made, and after three separate cost estimates—evidences the fact this "was nothing more than an 'afterthought.'" *See*

ACLU of Missouri Found., 504 S.W.3d at 156 (finding knowing violation of Sunshine Law based on late assertion of exemption).[8]

2. DHSS committed a purposeful violation of the Sunshine Law

"A purposeful violation of the Sunshine Law occurs when there is 'a conscious design, intent, or plan to violate the law and do so with awareness of the probable consequences."' *Strake*, 473 S.W.3d at 645 (quoting *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. banc 1998) (internal quotations omitted)). Again, the *Robinwood* case is instructive, for there the Supreme Court found that Robinwood's conscious "decision to withhold the requested documents requested [sic] to avoid contractual liability amounts to 'purposely' violating the Sunshine Law." 473 S.W.3d at 646 (citing *Spradlin*).

The secret plan advocated by Mr. Land, the former State Registrar—which DHSS followed meticulously—is a textbook case of a purposeful violation of the Sunshine Law. Here, again, is that plan.

> I would not honor the request. I would require them to take you to court and then bring in national geneological [sic] and vital records experts to testify why making indexes is not good public policy. By delaying this you might file a regulation or get the Legislature to clarify the intent of the law.

SOF ¶ 61.

As can be seen, the secret plan is in two parts. First: "I would not honor the request [and] would require them to take you to court." As the Western District Court of Appeals

[8] Further evidence of DHSS' knowing violation comes from the improper cost estimates submitted by DHSS. Specifically, in their initial e-mails to Ms. Ganz, both Ms. Hollis and Ms. Loethen wrote that under the Sunshine Law DHSS was entitled to charge for staff time to respond to the requests, and quoted hourly rates of $21.38 and $20.85, respectively. SOF ¶¶ 19, 39. However, when each of them later submitted actual cost estimates, the used hourly rates of $42.50 and $41.78, respectively. SOF ¶¶ 44, 46. Given their earlier statements, they knew the rates they actually quoted were improper.

has said, this is the paradigm of a purposeful violation of the Sunshine Law. "Chapter 610 would be a hollow law if it permitted a custodian intentionally to forestall production of public records until the requester sued." *Buckner v. Burnett*, 908 S.W.2d 908, 911 (Mo. App. - W.D. 1995). Accordingly, "[a] public official's intentionally forestalling production of public records until the requester sues would be a purposeful violation of Chapter 610 and would be subject to a fine and reasonable attorney fees." *Id.*

The second part of the plan is equally devious: "By delaying this you might … get the Legislature to clarify the intent of the law." In fact, DHSS took Mr. Land's plan a step further—it has used the delay caused by the lawsuit to attempt to get the Missouri Legislature to amend Missouri law to **permanently** close birth and death listings.

This secret plan represents an utter disdain for "the public policy of this state that … records … of public governmental bodies be open to the public unless otherwise provided by law." Mo. Rev. Stat. § 610.011.1. Governmental bodies are not allowed to deny requests and **then** seek a law closing them; instead, they may only close records that are closed by existing law. *See ACLU of Missouri Found.*, 504 S.W.3d at 156 (finding knowing violation of Sunshine Law based on assertion of a "penumbral right of privacy").

It is also important to consider the chronology of events—specifically, the fact DHSS' denial came only **after** Ms. Ganz's counsel had debunked the original $1.49 million demands for fees, which was clearly intended to be a back-door denial of Ms. Ganz's requests. And when DHSS refigured its cost estimate using information supplied by Ms. Ganz's counsel, it arrived at an estimate of approximately $5,000—still significantly higher than the allowable charges, but in a range that Ms. Ganz might consider paying.

Faced with this reality, DHSS had to scramble to find a way to prevent the disclosure. It found that way when Mr. Land provided a literal roadmap to achieve DHSS' illicit goal: deny the request, make Ms. Ganz sue, and then use the delay caused by the resulting lawsuit to go to the Missouri Legislature and try to get them to change the law. It is hard to imagine a more purposeful plot.

Finally, Ms. Loethen was unquestionably put on notice of the fact DHSS was violating the Sunshine Law when she received an 11-page letter from Ms. Ganz's counsel detailing why DHSS' sudden denial—nearly six months after it received Ms. Ganz's request—was a violation of the Sunshine Law. SOF ¶ 69. Unable to rebut that charge, Ms. Ganz simply ignored the letter, causing Ms. Ganz to have to sue—which we now know was DHSS' secret plan after all. SOF ¶ 70.

3. This Court should award penalties and attorney's fees

Based on DHSS' knowing and purposeful violations, this Court should award the maximum penalty of $5,000 as to each request that was wrongfully denied, *i.e.*, the request for the birth records, and the request for the death records. *See Malin*, 2019 WL 189158, at *5 (finding Sunshine Law allows a $5,000 penalty for each violation).

In addition, this Court should award Ms. Ganz her attorney's fees and costs, to be determined following the Court's entry of summary judgment.

III. CONCLUSION

WHEREFORE, summary judgment should be granted in favor of Plaintiff Brooke Schreier Ganz and against Defendant Missouri Department of Health & Senior Services on

all claims in her Petition. Following the entry of the Court's order granting summary judgment, Ms. Ganz should be directed to file her request for attorney's fees pursuant to Missouri Revised Statutes § 610.027.

Respectfully submitted,

LATHROP GAGE, LLP

By: */s/Bernard J. Rhodes*

Bernard J. Rhodes (MO #29844)
Taryn A. Nash (MO #70271)
2345 Grand Blvd., Ste. 2400
Kansas City, MO 64108
(816) 292-2000 – Telephone
(816) 292-2001 – Facsimile
brhodes@lathropgage.com
tnash@lathropgage.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that on May 21, 2019, the foregoing was served via e-mail on the following:

Shawna Bligh
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Shawna.Bligh@ago.mo.gov

/s/Bernard J. Rhodes
An Attorney for Plaintiffs