

MISSOURI CIRCUIT COURT  
NINETEENTH JUDICIAL CIRCUIT  
COLE COUNTY

**FILED**  
JUN 23 2014  
COLE COUNTY  
CIRCUIT COURT

American Civil Liberties Union Fund, et al.,	)	
	)	
Plaintiff,	)	
	)	Cause No: 12AC-CC00692
v.	)	
	)	Division: 1
Missouri Department of Corrections,	)	
	)	
Defendant.	)	

**ORDER AND JUDGMENT**

This Court has before it Plaintiffs’ motion for partial summary judgment and Defendant’s cross-motion for summary judgment. Both motions have been fully briefed. For the reasons stated below, Plaintiffs’ motion for partial summary judgment is granted. Defendant’s motion for summary judgment is denied.

**I. Background.**

While incarcerated at Northeast Correctional Center, Mr. Allaeddin Qandah submitted an Informal Resolution Request (“IRR”) and later a grievance alleging that Department of Corrections (“DOC”) employees damaged his Quran during a cell search.

After receiving a complaint from Qandah, Plaintiff Michael Hill, on behalf of co-Plaintiff American Civil Liberties Union (“ACLU”), wrote to DOC on March 27, 2012. Pursuant to Missouri’s Sunshine Law, Hill requested “copies of any and all records relating to [Qandah’s] ‘IRR # NECC 11321 - property damage.’”

On May 17, 2012, Heather McCreery, Legal Counsel for DOC, replied in writing to Hill denying the request for the records. In her letter she cited Federal Regulation 28 C.F.R. § 40.10 as grounds for denial pursuant to § 610.021(14). In response to a letter challenging the stated

grounds for denial, on June 4, 2012, McCreery sent Plaintiffs' counsel a letter reasserting DOC's position:

Section 610.021(14) authorizes a public governmental body (such as the Department) to close records which are protected from disclosure by either federal or state law... Federal Regulation 28 C.F.R. § 40.10, issued under the authority of 42 U.S.C. 1997e, provides that "[r]ecords regarding the participation of an individual in the grievance proceedings shall be considered confidential..."

The parties agree that there are fourteen documents responsive to Plaintiffs' Sunshine Law request and that none of the records have been disclosed in response to the Sunshine Law request.

DOC modified its position in its First Amended Answer to claim three additional reasons for closing the records besides the one claimed in McCreery's letters. DOC now claims "[t]he requested records are exempt from disclosure under §§ 610.021(14) and 217.075.1(3), RSMo" as "internal administrative report[s] or document[s] relating to institutional security." DOC also asserts that "[t]he Requested Records are Exempt from Disclosure under § 610.021(13), RSMo" as "[i]ndividually identifiable personnel records, performance ratings, or records pertaining to employees or applicants for employment." Finally, DOC states that "[t]he requested records are exempt from disclosure under § 610.021(1), RSMo" because they "relate to... [l]egal actions, cause of action or litigation involving a public governmental body and any confidential or privileged communication between a public governmental body or its representatives and its attorneys."

## **II. Standard of Review**

A motion for summary judgment must be granted when, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *ITT Commercial Fin. Corp. v. Mid-Am.*

*Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993). The moving party need not establish issues by unassailable proof. *Martin v. City of Washington*, 848 S.W.2d 487, 492 (Mo. banc 1993). Where a fact is established on a summary judgment motion, the burden falls to the non-moving party to establish that an issue of controversy remains. *Id.*

In evaluating Plaintiffs' claim under the Sunshine Law, this Court must consider whether (1) Defendant is a "public governmental body"; (2) the records at issue are "public"; and (3) any statutory exemptions apply. *See e.g., News-Press & Gazette Co. v. Cathcart*, 974 S.W.2d 576 (Mo. App. W.D. 1998).

### **III. Conclusions of Law**

#### **A. Defendant is "public governmental body" subject to the Sunshine Law.**

Whether Defendant is "public governmental body" is a threshold issue. *See, e.g., Stewart v. Williams Commc'ns, Inc.*, 85 S.W.3d 29, 32 (Mo. App. W.D. 2002) (holding that provisions of the Sunshine Law apply only to the records of public governmental bodies). The Sunshine Law defines "public governmental body" as including any "administrative or governmental entity created by the constitution or statutes of this state" as well as "[a]ny department or division of the state." § 610.010(4), RSMo. There is no dispute that Defendant is a government entity created by the statutes of the State of Missouri and is therefore subject to the Sunshine Law.

#### **B. The records requested are public records under the Sunshine Law.**

The Sunshine Law defines "public record" as "any record, whether written or electronically stored, retained by or of any public governmental body." § 610.010(6), RSMo; *see also* § 217.075.1, RSMo ("All offender records compiled, obtained, prepared or maintained by the department [of corrections] or its divisions shall be designated public records within the meaning of chapter 610, except: ... Any internal administrative report or document relating to

institutional security.”). This Court finds the records responsive to Plaintiffs’ Sunshine Law request are “public records.”

**C. Defendant waived all defenses against disclosure but the exemption claimed in its response to Plaintiffs’ Sunshine Law request.**

No Missouri court appears to have addressed waiver of defenses in the Sunshine Law context. Defendant’s attempt to claim one exemption when it denies a citizen’s request for records, and then claim additional exemptions apply after being sued for nondisclosure, is not supported by any reading of chapter 610, nor does it comport with the public policy of the state.

The Sunshine Law specifies that:

If a request for access is denied, the custodian shall provide, upon request, a written statement of the grounds for such denial. Such statement shall cite the specific provision of law under which access is denied and shall be furnished to the requester no later than the end of the third business day following the date that the request for the statement is received.

§ 610.023.4, RSMo. In fact, Plaintiffs’ Sunshine Law request explicitly asked for “a letter listing the specific exemptions upon which you rely for each denial.” Defendant’s letters to both Hill and Plaintiffs’ attorneys cited to only 28 C.F.R. § 40.10 as the basis for refusing to disclose any responsive records pursuant to § 610.021(14). This is consistent with Defendant’s own *Public and Confidential Records* policy (D1-11.2), which states that offender grievance records are “closed” pursuant to 28 C.F.R. § 40.10.

“Chapter 610 embodies Missouri’s commitment to open government and is to be construed liberally in favor of open government.” *State ex rel. Mo. Local Gov’t Ret. Sys. v. Bill*, 935 S.W.2d 659, 664 (Mo. App. W.D. 1996). Furthermore, “[t]he provisions of the Sunshine Law are to be liberally construed to promote this public policy.” *Stewart v. Williams Commc’ns, Inc.*, 85 S.W.3d 29, 32 (Mo. App. W.D. 2002). Public records are “presumed open to public inspection.” *N. Kansas City Hosp. Bd. of Trustees v. St. Luke’s Northland Hosp.*, 984 S.W.2d

113, 119 (Mo. App. W.D. 1998). The legislature has mandated that if a custodian denies access to public records, the custodian must, upon request, specify the legal basis for the denial. Permitting Defendant to assert additional reasons for denial after litigation commences, as it attempts here, renders superfluous the statutory requirement of notice of the reasons for denial. *See Civil Serv. Comm'n of City of St. Louis v. Members of Bd. of Aldermen of City of St. Louis*, 92 S.W.3d 785, 788 (Mo. banc 2003) (presuming that “the legislature did not insert idle verbiage or superfluous language in a statute.”). It would also discourage citizens from retaining attorneys (or litigating pro se) to challenge the exemptions claimed by a government entity that withholds documents, if, after a lawsuit is filed, the government could cite additional exemptions. This is also contrary to public policy.

This Court holds that, for purposes of determining whether DOC's May 17, 2012 and June 4, 2012 responses violated the Sunshine Law, DOC waived all additional exemptions from disclosure but the claimed exemption under 28 C.F.R. § 40.10 noted in those denials of records.

Although the nature and applicability of unclaimed waived exemptions, be it permissive or mandatory, may matter with respect to the remedy available to a Sunshine Law plaintiff, this Court need not decide the issue here, as the parties have resolved all remaining issues.

**D. The responsive records are not exempt pursuant to 28 C.F.R. § 40.10 and § 610.021(14), RSMo, because the federal statutory authority for 28 CFR § 40.10 has been repealed.**

Section 610.021(14) states that government entities may close “[r]ecords which are protected from disclosure by law.” Plaintiff claims that the term “law” refers to statutes only. DOC claims that 28 C.F.R. § 40.10 is a “law” that authorizes the closure of the records at issue. Defendant contends that federal regulations are different than state regulations and might provide a Sunshine Law exemption. This Court need not decide this issue because the federal statutory

authority for 28 C.F.R. § 40.10, 42 U.S.C. § 1997e (1980), has been repealed and, therefore, it is not a valid authority on which DOC can rely to close the requested records.

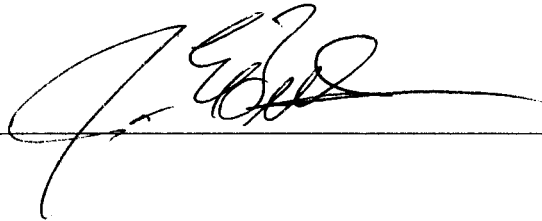
**IV. Conclusion.**

For the foregoing reasons, this Court grants Plaintiffs' motion for partial summary judgment and denies Defendant's motion for summary judgment. All remaining claims have been resolved by the parties.

So Ordered.

6/23/14

Date

A handwritten signature in black ink, appearing to be "J. E. ...", written over a horizontal line.