

IN THE CIRCUIT COURT OF CLAY COUNTY MISSOURI

NICOLE GALLOWAY, AUDITOR OF)
THE STATE OF MISSOURI,)

Plaintiff,)

v.)

CLAY COUNTY, MISSOURI,)

Serve: Megan Thompson, County Clerk)

1 Courthouse Square)

Liberty, MO 64068)

and)

JERRY NOLTE, Clay County Commissioner,)

Serve: 1 Courthouse Square)

Liberty, MO 64068)

and)

GENE OWEN, Clay County Commissioner,)

Serve: 1 Courthouse Square)

Liberty, MO 64068)

and)

LUANN RIDGEWAY, Clay County)

Commissioner,)

Serve: 1 Courthouse Square)

Liberty, MO 64068)

and)

NICOLE BROWN, Assistant County)

Administrator and Records Custodian,)

Serve: 1 Courthouse Square)

Liberty, MO 64068)

Defendants.)

No. _____

PETITION TO ENFORCE ADMINISTRATIVE SUBPOENA AND FOR DECLARATORY JUDGMENT

The Missouri Constitution imposes a duty on the Missouri State Auditor (Auditor) to conduct all audits required by law. Mo. Const. Art. IV, Section 13. In conducting an audit, the Auditor is entitled by statute to inspect all records and examine witnesses. Pursuant to this authority, the Auditor is granted subpoena power to compel compliance with this authorized access, and criminal penalties are in place to punish conduct that interferes with the Auditor's performance of these duties. §§29.235; 29.250 RSMo.¹

In December, 2018, the Auditor commenced an audit required by law of the county of Clay, Missouri (the County) pursuant to a citizen petition under §29.230.2. As part of this audit, the Auditor sought to review meeting minutes of the Clay County Commission (Commission). The Commission refused to produce any closed meeting minutes whatsoever. The Auditor served a subpoena to compel production of meeting minutes. The County refused to produce the records and failed to appear at the deposition.

The Auditor respects the court's time. Until today, the Auditor has never had to enforce a subpoena of an auditee. But the County's actions are unprecedented.

The Auditor here asks this Court to enforce the subpoena and/or enter a declaratory judgment as set forth below:

1. Nicole Galloway is the duly elected auditor of the State of Missouri.

¹ Unless otherwise noted, all statutory references are to the Revised Statutes of Missouri, 2016, as amended.

2. Defendant Clay County, Missouri, is a political subdivision of the State of Missouri, and is a non-charter county of the first-class.

3. Defendant Jerry Nolte is a resident of Clay County, Missouri and is the duly elected presiding commissioner of Clay County, Missouri.

4. Defendant Luann Ridgeway is a resident of Clay County, Missouri, and is the duly elected eastern commissioner of Clay County, Missouri.

5. Defendant Gene Owen is a resident of Clay County, Missouri, and is the duly elected western commissioner of Clay County, Missouri.

6. Nicole Brown is an Assistant County Administrator and the designated custodian of records for Clay County.

7. By letter dated August 27, 2018, the State Auditor's Office informed the County that sufficient signatures were certified by the Clay County Board of Election Commissioners to commence an audit of Clay County (the County) pursuant to §29.230.2.

8. By letter dated December 18, 2018, the State Auditor's Office notified the County of the commencement of the audit, along with a description of the audit objectives and the responsibilities of County management during the audit.

9. In the description of audit objectives and the responsibilities of County management, the County was notified that the methodology of the audit includes "reviewing minutes of meetings, written policies and procedures, financial records, and other pertinent documents; interviewing various personnel, as well as certain external parties; and testing selected transactions."

10. At the commencement of an audit, survey work is done to obtain sufficient knowledge of a county's personnel, programs, and operations to plan the audit; to consider significance and risk in planning; to define audit scope and objectives; and to develop the methodology and detailed plan for addressing the audit objectives.

11. As part of the survey period of any audit, records of the governing body's meeting (minutes) are routinely reviewed in all types of audits required of the Missouri State Auditor under Missouri law.

12. The governing body of the County is the Clay County Commission.

13. The Commission is responsible for oversight of county budgets, expenditure of funds, and other significant decisions that impact County funds and resources, County policy, and other subjects of the business of the County.

14. Commission meeting minutes are a record of significant decisions made and discussion leading to those decisions.

15. Based in part on the allegations in paragraphs 13 and 14, it is necessary for auditors to review all Commission meeting minutes, both open and closed.

16. During the months of December 2018 and January 2019, audit staff requested Commission meeting minutes.

17. All requests for records by audit staff to the County from the commencement of the audit until the filing of this action were received by records custodian Defendant Nicole Brown.

18. All requests for records by audit staff to the County from the commencement of the audit until the filing of this action were received by County personnel designated to receive and respond to such requests.

19. All requests for records of Commission meeting minutes by audit staff to the County from the commencement of the audit until the filing of this action were received by County personnel designated to receive and respond to such requests.

20. All requests for records of Commission meeting minutes by audit staff to the County from the commencement of the audit until the filing of this action were received by records custodian Defendant Nicole Brown.

21. All requests for closed records of Commission meeting minutes by audit staff to the County from the commencement of the audit until the filing of this action were received by County personnel designated to receive and respond to such requests.

22. All requests for closed records of Commission meeting minutes by audit staff to the County from the commencement of the audit until the filing of this action were received by records custodian Defendant Nicole Brown.

23. In response to requests for Commission meeting minutes, the audit staff were directed to the County's website for open meeting minutes, but denied access to closed meeting minutes in their entirety.

24. In response to requests for Commission meeting minutes, the County refused to provide access to closed meeting minutes unless the records were open to the public.

25. In response to requests for Commission meeting minutes, the County refused to provide access to closed meeting minutes unless the records were open within the meaning of Chapter 610 (the Sunshine Law).

26. In response to requests for Commission meeting minutes, the County refused to provide access to closed meeting minutes.

27. The County refused to provide access to closed meeting minutes by claiming that the County is not required to provide access to records other than those of the County's accounts and transactions.

28. The County's website does not contain all open meeting minutes of the Commission.

29. On January 31, 2019, the Commission filed suit in the Circuit Court of Cole County seeking a declaratory judgment and injunction related to their claim that the State Auditor's Office's request for closed meeting minutes was an unconstitutional act because such a request constituted an unconstitutional "performance audit."

30. In the County's suit, the County objected to releasing records that might contain attorney-client privileged information. In spite of this limited objection, the Commission produced no closed meeting records whatsoever, redacted or otherwise.

31. On January 31, 2019, the State Auditor's Office served the Assistant County Administrator with a subpoena to produce all Clay County Commission meeting minutes for the calendar years of 2017 and 2018.

32. On February 4, 2019, the Commission amended their petition to include, among other things, the subpoena referenced in paragraph 31.

33. On April 8, 2019, the Circuit Court of Cole County denied the Commission's request for an injunction, and on October 23, 2019, that same court dismissed the remainder of the Commission's case ruling (1) that there is nothing per se unconstitutional about a records request; (2) that issues with the content of requested records are to be litigated in an action to enforce an administrative subpoena (which had not been filed); and (3) the Auditor is not limited to performing financial post-audits of county accounts, and is statutorily authorized to conduct "performance" audits.²

34. On October 31, 2019, the State Auditor's Office requested records and information from the County, including the request for open and closed Commission meeting minutes. The County did not fulfill the request.

35. On November 8, 2019, the State Auditor's Office served Assistant County Administrator and Records Custodian Nicole Brown with a subpoena attached as Exhibit A and incorporated by reference herein. This subpoena requires, *inter alia*, that the Commission produce closed meeting minutes.

36. The subpoena set a deposition and records production date of November 25, 2019.

37. The County refused to produce any Commission closed session meeting minutes, redacted or otherwise.

38. On November 25, 2019, Nicole Brown failed to appear for her deposition.

² The Commission did not challenge the constitutionality of the statute authorizing performance audits.

39. The County did not challenge the authority of the Auditor to subpoena Nicole Brown for the November 25, 2019, deposition.

40. Nicole Brown refused to appear for the November 25, 2019, deposition upon less than two business-days' notice to the Auditor that she had a "planned vacation."

41. On November 25, 2019, Defendant County failed to produce any closed meeting minutes, redacted or otherwise.

42. A review of County meeting minutes is necessary to properly conduct a lawful audit.

43. Testimony from the County's designated records custodian is necessary to properly conduct this audit of the County.

44. Testimony from the County's Assistant County Administrator is necessary to properly conduct this audit of the County.

COUNT I - ENFORCEMENT OF SUBPOENA

45. Paragraphs 1 through 44 are incorporated and re-alleged as if fully set forth herein.

46. The Auditor's audit of the County is made pursuant to constitutional and statutory authority.

47. The records subpoenaed as shown in Exhibit A are not too indefinite.

48. The requirement of the attendance of the County's designated records custodian is not too indefinite.

49. The information sought in the request for County Commission meeting minutes as shown in the subpoena is reasonably relevant to the performance of an audit by the Missouri State Auditor under Missouri law.

50. The testimony sought from the County's designated records custodian is reasonably relevant to the performance of an audit by the Missouri State Auditor under Missouri law.

WHEREFORE, the Missouri State Auditor requests that this Court enter judgment enforcing its subpoena attached as Exhibit A in the following respects:

- I. That Nicole Brown personally appear before the State Auditor or her representatives at a location and time to be set forth by separate Order of this Court, to answer questions in connection with the audit of Clay County, Missouri.
- II. That Nicole Brown and/or other responsible officials of Clay County, Missouri produce or make available to the State Auditor all records of Clay County Commission meeting minutes, both open and closed.
- III. The County may make appropriate redactions for attorney-client privileged communications if a log is provided for each such redaction that contains sufficient information to determine whether the attorney-client privilege is properly invoked; and
- IV. The County may make appropriate redactions for attorney work-product content if a log is provided for each such redaction that contains sufficient information to determine whether the work-product doctrine is properly invoked.

COUNT II - DECLARATORY JUDGMENT

51. Paragraphs 1 through 50 are incorporated and re-alleged as if fully set forth herein.

52. The Auditor is conducting an ongoing audit of the County, and such audit will require the examination of records and witnesses that will include information and records that are not open, public records.

53. In the Auditor's conduct of the audit of the County, the Auditor has access to all records that are related to an audit conducted under the Missouri Constitution and in accordance with statute.

54. The need to examine records as set forth herein, and particularly in paragraphs 52 and 53, has been and will be ongoing in nature.

55. The State Auditor has a legally protectable interest in performing her constitutionally and statutorily required duties in the manner provided by law.

56. A subpoena for closed meeting minutes of the Commission has been served and compliance has been refused.

57. From the foregoing, a justiciable controversy exists.

58. The County's refusal to provide access to closed meeting minutes is based upon the County's erroneous proposition that the State Auditor is not entitled to access to records that are closed under the Sunshine Law.

59. The County's refusal to provide access to closed meeting minutes is based upon the County's erroneous proposition that the State Auditor is not entitled to access to

records that are closed under the Sunshine Law absent a showing to the County as to how the content of such records is directly related to the receipt and expenditure of public funds.

60. The County's refusal to provide access to closed meeting minutes is based upon the County's erroneous proposition that the State Auditor is prohibited by the Missouri Constitution from accessing certain records which include records closed under the Sunshine Law.

61. The County's refusal to provide access to closed meeting minutes is based upon the County's erroneous proposition that the State Auditor is prohibited by the Missouri Constitution from accessing certain records which include records closed under the Sunshine Law absent a showing to the County as to how the content of such records is directly related to the receipt and expenditure of public funds.

WHEREFORE, the Missouri State Auditor requests that this Court enter judgment in favor of the Auditor, award her fees and costs in this action, and make the following declarations of law:

- I. The State Auditor is permitted access to records of an auditee without regard to whether such records may be closed under Chapter 610 (the Sunshine Law) or any other provision of law;
- II. The Missouri Constitution does not deny the State Auditor access to any particular record or any particular category of records;
- III. The State Auditor is not required to make a showing that the content of a record is related to the receipt and expenditure of public funds before a county is required to provide access to the record;

- IV. With the exception of attorney-client privileged communications and attorney work product content, the County is not permitted to redact any information from any record on the basis that the information is not directly related to the receipt and expenditure of public funds;
- V. The County is not permitted to withhold any record from review by the State Auditor's Office unless such a review by the State Auditor is specifically prohibited by law.

Respectfully submitted,

/s/ Joel E. Anderson

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Attorneys for Plaintiff Missouri State Auditor

RULE 55.03 CERTIFICATE

The undersigned hereby certifies that the foregoing was filed electronically, the attorney shown thereon as the signer signed the original of the foregoing, and the original signed filing will be maintained by the filer for a period of not less than the maximum allowable time to complete the appellate process.

/s/ Joel E. Anderson
Joel E. Anderson, 40962



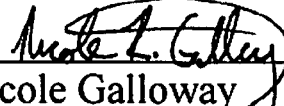
OFFICE OF MISSOURI STATE AUDITOR

SUBPOENA

**To: Nicole Brown, Assistant County Administrator
1 Courthouse Square
Liberty, MO 64068**

YOU ARE COMMANDED AND REQUIRED to appear personally before the State Auditor or her representative(s) at the Fletcher Daniels State Office Building, Room 502, 615 East 13th Street, Kansas City, MO 64106, at 10:00 a.m. on Monday, November 25, 2019, for purposes of providing testimony about and producing for examination, copying, and interrogation the records and subjects described in Exhibit A attached to this Subpoena.

ISSUED this 8th day of November, 2019, pursuant to Section 29.235.4(1) of the Revised Statutes of Missouri.



Nicole Galloway
Missouri State Auditor

I served the foregoing subpoena by Leaving with Alison Cook, Public Services Receptionist, Commission Office on this 8th day of November, 2019.


 November 8, 2019

Exhibit A



OFFICE OF MISSOURI STATE AUDITOR

EXHIBIT A-page 1 of 3

1. 2017 and 2018 open and closed Clay County Commission meeting minutes;
2. Confirmation that the county is securing all county email and former County Administrator Dean Brookshier's computer;
3. List of employees with take home cars along with their home address and work address;
4. 2017 & 2018 payroll data;
5. Description of legal and professional services provided to the county by the following firms in 2017 and 2018, including copies of contracts, memoranda of understanding, engagement letters, etc., for such services:

Fisher & Phillips LLP
Gaddy Law
Graves Garrett
Husch Blackwell LLP
Husch Blackwell Strategies
Johnston Law Firm
Morgan Pilate
Spencer Fane LLP
Wyrsh Hobbs & Mirakian

6. A listing or copies of all records and user files on the former County Administrator Dean Brookshier's computer;
7. Year Ended December 31, 2018 annual audit reports:
 - a. Compliance
 - b. Financial Statements



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EXHIBIT A-page 2 of 3

8. Detailed financial information for 2019 financial transactions to-date in Excel (as previously provided for 2017 & 2018, if applicable), including:
 - a. Expenditures
 - b. List of Disbursements
 - c. P Card Transactions
 - d. Payroll
9. County bid policies and procedures in place from 2017 to present, including policies regarding selection of the evaluation team, performing evaluations and making recommendations.
10. List of all officials and employees currently bonded;
11. Documentation of any software problems encountered with assessment and property tax system/systems during 2017, 2018, and 2019 to-date, and if applicable, how and when these problems were resolved;
12. Policies and procedures effective from 2017 to present regarding the assessment appeals process;
13. Assessments for Ford Motor Company and any additions/abatements for 2017, 2018, and 2019 to-date;
14. Assessments and additions/abatements for all properties owned by the 3 county commissioners for 2017, 2018, and 2019 to-date;
15. Total county assessed valuations by type of property (residential, commercial, personal) for 2017, 2018, and 2019 to-date;



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EXHIBIT A-page 3 of 3

16. Expense reports of the Tax Maintenance Fund for 2019 to-date;
17. Copies of the Collector's collection agreements with any cities effective from 2017 to present;
18. All written Parks Department cash handling procedures effective from 2017 to present (e.g. shelter houses, boat slips, camping, concessions/retail, etc.), excluding Jesse James Birthplace and Bank, which were previously provided;
19. A list of boat slips occupied and unoccupied, boat slip rental agreements, and report of revenues generated from each boat slip rental for 2018 and 2019 to-date;

This request for records includes all materials that exist in paper ("hard copy") or electronic form (including but not limited to records and data maintained on computers, tablets, smart phones, external electronic storage drives, thumbnail drives, remote servers or back up tapes). All information requested in the items above are subject to inspection, review and copying by the state auditor. Section 29.235.4(1), RSMo.

Where an attorney-client privileged communication or the attorney work product doctrine for imminent or pending litigation is asserted as a basis for redaction of any portion of any record requested, the county must provide a privilege log or statement noting the reason for each assertion of privilege or the work product doctrine. Such log must describe the nature of the redacted information in sufficient detail to permit the State Auditor's Office to assess the applicability of the attorney-client privilege or work product doctrine.