

FINAL REPORT: AGO INQUIRY INTO SUNSHINE LAW COMPLAINT FILED BY MISSOURI ALLIANCE FOR FREEDOM

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BACKGROUND

On May 2, 2017, the Missouri Alliance for Freedom (“MAF”) served a Sunshine request on the State Auditor’s Office (“SAO”) seeking three categories of public records: (1) records relating to an audit of the timeliness of state income-tax refunds; (2) all communications to and from SAO General Counsel Paul Harper from April 27, 2015 to the present; and (3) all communications to and from SAO Senior Advisor Doug Nelson from April 27, 2015 to the present. On May 8, 2017, MAF served a second Sunshine request on the SAO, seeking public records relating to an audit conducted by the SAO of the State Treasurer’s handling of unclaimed property. On May 26, 2017, MAF served a third Sunshine request on the SAO, seeking all communications sent or received by State Auditor Nicole Galloway during her time in office.

Over the following weeks, MAF and the SAO exchanged a series of communications relating to the Sunshine requests. In letters dated June 1, 2017 and June 30, 2017, the SAO indicated that it would require additional time to produce responsive records due to the scope of the requests. On July 17, 2017, MAF filed a lawsuit against Auditor Galloway, contending that she had violated the Sunshine Law by failing to produce public records responsive to MAF’s Sunshine requests. *See Missouri Alliance for Freedom, Inc. v. Nicole Galloway*, Case No. 17AC-CC00365 (Cole County Circuit Court).

On August 29, 2017, the SAO produced 173 pages of public records responsive to the May 26 request, and the SAO also closed certain responsive materials pursuant to §§ 29.070, 29.200, 29.221, 610.021(14), and 610.021(17), RSMo. On September 27, 2017, the SAO produced an additional 4,479 pages of public records responsive to the May 26 request, and the SAO closed certain responsive materials pursuant to §§ 29.070, 29.200.17, 29.221, 610.021(13), 610.021(14), 610.021(17), and 610.021(21), RSMo, and 17 U.S.C. § 102.

On December 13, 2017, MAF announced that it had filed a Sunshine Law complaint against the SAO. In that complaint, MAF contends that the SAO violated the Sunshine Law in two ways. First, MAF contends that the SAO violated the Sunshine Law by declining to create a detailed log setting forth the SAO’s legal justification for closing each public record that it has withheld. Second, MAF contends that the SAO improperly withheld or destroyed text messages sent or received on Auditor Galloway’s State-issued cellular phone.

On December 20, 2017, MAF transmitted a letter to the Attorney General’s Office suggesting three additional lines of inquiry: (1) “Has Auditor Galloway corresponded by text or similar messages concerning public business using her private cell phone?”; (2) “Has Galloway, Harper, or Nelson destroyed or deleted text messages, whether on a private or State-provided phone?”; and (3) “Does Auditor Galloway or her staff use or rely on Confide or a similar app, either on their State-provided cell phones or on their personal phones, to discuss public business?”

FACTUAL FINDINGS

The Attorney General's Office ("AGO") has conducted an inquiry into the merits of MAF's Sunshine complaint. Throughout the course of the inquiry, the SAO has cooperated fully with the AGO and has provided access to all witnesses, documents, and information requested by the AGO. The AGO met in-person with five high-level members of the SAO. The SAO also provided documents and additional information requested by the AGO.

Auditor Galloway and other senior SAO staff do communicate regarding public business over text message on State-issued cellular phones. The SAO provided access to many text messages sent and received by Auditor Galloway and other senior SAO staff. Many of these text messages are "transitory" in nature, relating to non-substantive matters like logistics and scheduling. For example, some text messages noted that a particular audit report was available for review, while others involved scheduling of phone calls and meetings. SAO staff indicated that those staff having State-issued phones, including Auditor Galloway, conduct all state business on those phones.

The SAO does not ordinarily retain text messages that constitute "transitory" communications. Most transitory text messages are automatically deleted after 30 days, which was the default automatic-deletion setting on the SAO's State-issued phones.

When text messages relate directly to an audit, auditing standards often require that the information contained in those text messages be memorialized in the audit file, even if the text messages might otherwise constitute "transitory communications." Under these circumstances, the SAO records the content of the relevant text messages in another medium, such as email, and retains that record as part of the audit file. Thus, the SAO retains the content of such text messages, even if the office does not retain the text messages themselves.¹

With regard to the MAF Sunshine requests, the SAO identified 65,489 pages of potentially responsive documents, not including attachments. At the time of the meetings with the AGO, the SAO had already reviewed approximately 44,000 pages of responsive records, and that review had taken at least 419 hours of staff time. The SAO has reviewed these records for, among other things, attorney-client privileged materials, which are closed under § 610.021(1) and 610.021(14), RSMo; personnel files that are closed under § 610.021(13), RSMo; audit work papers and supporting documents, which are closed under §§ 610.021(14) and 29.200.17, RSMo; confidential audit-related communications that are closed under § 610.021(17), RSMo; information whose disclosure would pose cybersecurity risks, which is closed under § 610.021(21), RSMo; copyrighted materials, which are closed under § 610.021(14), RSMo; and the identities of individuals who have submitted anonymous reports of allegedly improper governmental conduct, which are closed pursuant to §§ 610.021(14) and 29.221.1, RSMo. Approximately 22,000 pages of potentially responsive documents remain for review. As of January 8, 2018, the SAO had produced 24,573 pages in response to MAF's Sunshine requests. The SAO received a total of 110 Sunshine requests during 2017.

SAO staff indicated that no member of the SAO uses Confide or any similar app to discuss public business. The SAO further indicated that using such apps to discuss public

¹ These audit-related text messages are part of the audit working papers and are therefore confidential, closed records. § 29.200.17, RSMo. Only the final, published audit report constitutes a public record. § 29.200.13, RSMo; *Michaeal A. Wolff v. William Webster and Margaret Kelly*, CV188-947CC (Cole County Circuit Court, Kinder, J., October 24, 1990).

business would not be permitted by the office. An inspection of all SAO State-issued cellular phones confirmed that Confide was not installed on any of those phones.

LEGAL CONCLUSIONS

I. The SAO Did Not Violate the Sunshine Law by Declining to Create a Privilege Log or “Vaughn Index.”

MAF contends that the SAO violated § 610.023.4, RSMo, by declining to produce a so-called “Vaughn index” cataloging the SAO’s statutory basis for closing each record that the SAO closed. Because the Sunshine Law does not require the creation of a *Vaughn* index, we conclude that the SAO did not violate the Sunshine Law by declining to create such a document.

In the context of litigation under the federal Freedom of Information Act (“FOIA”), a federal agency must create a “Vaughn index” that justifies its withholding of materials responsive to a FOIA request. “A *Vaughn* Index must: (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption.” *Citizens Comm’n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). Importantly, this rule “governs litigation in court and not proceedings before the agency.” *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm’n*, 216 F.3d 1180, 1190 (D.C. Cir. 2000). Even under FOIA, an agency need not produce a *Vaughn* index unless and until the agency’s withholdings are challenged in court. *See Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180, 187 n.5 (D.C. Cir. 2013) (collecting cases); *see also Schwarz v. Dep’t of Treasury*, 131 F. Supp. 2d 142, 147 (D.D.C. 2000) (“[T]here is no requirement that an agency provide a ‘search certificate’ or a ‘Vaughn’ index on an initial request for documents. The requirement for detailed declarations and Vaughn indices is imposed in connection with a motion for summary judgment filed by a defendant in a civil action pending in court.”).

Here, MAF contends that § 610.023.4 required the SAO to produce a *Vaughn* index in response to MAF’s Sunshine requests. Section 610.023.4 provides:

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. The plain text of § 610.023.4 does not require a public governmental body to produce a detailed *Vaughn* index. *See id.* Instead, the statutory text merely requires the public governmental body, “upon request,” to cite “the specific provision of law” that justifies closing the public records at issue. *Id.* The “primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue.” *Sun Aviation, Inc. v. L-3 Communications Avionics Sys., Inc.*, 533 S.W.3d 720, 723 (Mo. banc 2017) (quotation omitted). Missouri courts do not engraft requirements onto a statute that the statutory text does not impose. *See Hill v. Ashcroft*, 526 S.W.3d 299, 309 (Mo. App. W.D. 2017); *Page v. Scavuzzo*, 412 S.W.3d 263, 267 (Mo. App. W.D. 2013). Thus, § 610.023 does not require a

public governmental body to create a *Vaughn* index, and the SAO did not violate the Sunshine Law by declining to create such a document.

This conclusion is consistent with the principle that the Sunshine Law does not require the creation of new records in response to a Sunshine request. “The plain language of the Sunshine Law does not require a public governmental body to create a new record upon request, but only to provide access to existing records held or maintained by the public governmental body.” *Jones v. Jackson Cnty. Circuit Court*, 162 S.W.3d 53, 60 (Mo. App. W.D. 2005). To require, absent a specific statutory requirement, that a public governmental body create a *Vaughn* index cataloging those records that it has closed would amount to a requirement that the body create new public records. Such a requirement would not only go beyond what the statutory text requires, but it also could impose extraordinary burdens on public governmental bodies. Here, for example, the SAO has already invested at least 419 hours of attorney time to review approximately 44,000 pages of documents potentially responsive to MAF’s Sunshine requests. Of those 44,000 pages, the SAO has withheld nearly 20,000 as either closed or non-responsive. Producing a *Vaughn* index detailing the basis for closing each of these documents would divert substantial amounts of additional staff time. The text of the Sunshine Law does not require this result.

For the foregoing reasons, we conclude that the SAO did not violate the Sunshine Law by declining to create a *Vaughn* index.

II. The SAO Did Not Violate the Sunshine Law by Deleting Transitory Text Messages Sent and Received by Auditor Galloway.

MAF also contends that the SAO violated Missouri’s records-retention laws by failing to retain text messages sent and received by Auditor Galloway’s State-issued phone. In particular, MAF contends that all texts messages sent or received by Auditor Galloway relating to public business must be retained permanently. For the reasons stated below, we conclude that this contention does not accord with Missouri law.

Chapter 109 of the Missouri Revised Statutes governs the records-retention obligations of Missouri governmental entities. Pursuant to Chapter 109, the State Records Commission issues records-retention schedules that prescribe what records governmental entities must retain and for how long the entities must retain those records. See § 109.260, RSMo. Each records-retention schedule is composed of records “series,” which identify specific categories of documents and the retention rules applicable to each category.

Two records series in the General Retention Schedule are directly relevant to this inquiry.² Record Series 21530—titled “General Correspondence – Elected Officials and Department Directors”—applies to:

Documents of a general nature that were created or received pursuant to law or in connection with the transaction of official business, which are not included in another records series. Examples are: interoffice or interdepartmental communications which do not subsequently result in the formulation of policy;

² The General Retention Schedule is available on the website of the Secretary of State at <https://www.sos.mo.gov/CMSImages/RecordsManagement/schedules/GRS/Admin.pdf>.

daily, weekly, or monthly work assignments (including duty roster files) for agency staff; calendars, appointment books, schedules, logs, diaries, and other records documenting meetings, appointments, telephone calls, trips, visits, and other daily activities of employees; and unpublished calendars of events and activities.

Records within Records Series 21530 must be retained until the completion of an elected official's or department director's term of office, at which time the records must be transferred to the State Archives for permanent retention.³

Records Series 21532—titled “General Correspondence – Transitory”—applies to:

Drafts or other documents having short-term value and which are not an integral part of administrative or operational records file; not required to sustain administrative or operational functions; not regularly filed under a standard records classification system; not required to meet statutory obligations; and recorded only for the time required for completion of actions.

Such “transitory” communications may be destroyed when no longer needed by the governmental entity.⁴

The SAO candidly admits that Auditor Galloway and other senior SAO staff communicate by text message regarding public business. Many of these text messages are not retained by the SAO. In MAF's view, *all* of Auditor Galloway's work-related text messages fall within Records Series 21530 and thus must be retained permanently. But the evidence indicates that those texts messages that are not retained by the SAO are “transitory” communications within the scope of Records Series 21532. These text messages include logistical communications regarding audit reports, scheduling communications regarding meetings and telephone calls, and other similar communications that fall within the scope of Series 21532. As

³ Records Series 21531 applies to similar communications that are sent or received by agency personnel other than an elected official or department director. Records within Records Series 21531 must be retained for three years following the end of the fiscal year in which the record was created, at which time the records may be destroyed.

⁴ Longstanding practice and governmental interpretations of Chapter 109 hold that certain documents and communications created in the course of transacting public business do not constitute “records” under Chapter 109 at all. See, e.g., Missouri Secretary of State, *What Is a Record? A Guide to Missouri's State Records Management Program*, <https://www.sos.mo.gov/records/recmgmt/whatisarecord> (indicating that “non-record materials” include “Materials that do not contribute to an understanding of the agency's operations or decision-making process” and “Materials that have no substantial administrative or operational value”). While no Missouri cases have addressed this analysis, longstanding governmental practice ordinarily informs the interpretation of a legal text. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014); *Mistretta v. United States*, 488 U.S. 361, 401 (1989). Because the SAO has not disputed that any of the text messages at issue here constitute “records” under Chapter 109, we need not address that issue in detail.

noted above, the General Retention Schedule does not require the SAO to retain such transitory communications for any period of time. Thus, the SAO does not violate Chapter 109 by not retaining those transitory text messages.

The descriptions of Series 21530 and 21532 are both written in broad terms, and some communications by an elected official might seem to fall within the scope of both series. Importantly, however, by its own terms, Series 21530 includes only those communications that “are not included in another records series.” Thus, if a communication falls within the scope of Series 21532, by definition it cannot fall within the scope of Series 21530. Here, the evidence indicates that the text messages that the SAO does not retain fall within the scope of Series 21532, and thus those messages do not fall within the scope of Series 21530.

For the foregoing reasons, we conclude that the SAO did not violate Chapter 109 by not retaining transitory text messages sent and received by Auditor Galloway.