

**IN THE CIRCUIT COURT OF CLAY COUNTY MISSOURI**

NICOLE GALLOWAY, AUDITOR OF )  
THE STATE OF MISSOURI, )  
 )  
Plaintiff, )  
 ) No. 19CY-CV12168  
v. )  
 )  
CLAY COUNTY, MISSOURI, et al., )  
 )  
Defendants. )

**MOTION FOR EXPEDITED RULING ON DECLARATORY JUDGMENT OR,  
IN THE ALTERNATIVE, MOTION FOR EXPEDITED TRIAL SETTING**

On behalf of the Defendants, in an official communication about the audit, trial counsel Hatley recently made a false accusation that the State Auditor violated the law and distributed it to Clay County staff. The false accusation presently serves to further impede audit progress and has the potential to intimidate audit staff as it suggests they may be committing a crime by performing their jobs.

Counsel Hatley's false accusations require the Court's attention because if not addressed in this current matter, such baseless legal conclusions will be cited by other auditees and counsel as potential reason not to cooperate with pending or future audits.

In order to prevent continued delay in the completion of this citizen-mandated audit, the Missouri State Auditor requests that the court set a hearing and briefing schedule on its declaratory judgment count or, in the alternative, set the matter for trial on an expedited trial schedule.

In support of this motion, the Plaintiff states the following:

1. A citizen's petition for a state audit was certified on August 27, 2018, and the State Auditor's Office (SAO) informed the County of the commencement of an audit of the County pursuant to §29.230.2.<sup>1</sup> ¶¶ 9, 10 (admitted in Answer).

2. During the months of December 2018 and January 2019, audit staff made repeated requests for Commission meeting minutes, including minutes that are not open records under the Sunshine Law. ¶ 25 (admitted in Answer). No closed minutes were provided to the SAO until December 12, 2019, approximately one week after filing of the instant case.

3. 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 SAO's request for closed meeting minutes was an unconstitutional act because such a request constituted an unconstitutional "performance audit." ¶ 38 (admitted in Answer).

4. 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

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Revised Statutes of Missouri, Cum. Supp. (2019).

county accounts, and is statutorily authorized to conduct "performance" audits. ¶ 42 (admitted in Answer).

5. The Commission continued its insistence that closed minutes of Commission meetings would not be provided to the Auditor. *See* Ex. C, November 6, 2019 letter from Hatley to Anderson ("[T]he parts of the closed session minutes we offered to provide were being offered because they were no longer properly closed[.]"); Ex. D, November 27, 2019 letter from Hatley to Anderson ("[T]he open session meeting minutes will be produced, along with any closed session meeting minutes that may now be open. Other closed session minutes will not be produced.")

6. The Commission's refusal to provide access to County records is based upon the Commission's proposition that the State Auditor is not entitled to access to records absent a showing to the Commission as to how the *content* of such records is *directly related to the receipt and expenditure of public funds*. Admitted in Answer, ¶ 84.

7. On November 8, 2019, the SAO served Defendant Nicole Brown with a subpoena to testify and produce records on November 25, 2019. Admitted in Answer, ¶¶ 44-45; attached hereto and to the First Amended Petition as Ex. A.

8. Nicole Brown failed to appear for the November 25, 2019 date called for in the subpoena attached as Ex. A.

9. On November 22, 2019, the SAO served Nicole Brown with another subpoena, calling for records and testimony. Admitted in Answer, ¶ 54; attached hereto and to the First Amended Petition as Ex. B.

10. On December 12, 2019, the amended date for Nicole Brown's second testimonial interview, the Commission refused to allow Defendant Brown to answer questions posed by audit staff under oath, claiming that such an event would constitute the unauthorized practice of law. Ex. E, December 12, 2019, e-mail from Hatley to Anderson. Such questioning is specifically provided for by statute: "Insofar as necessary to conduct an audit under this chapter, *the auditor or the auditor's authorized representatives* shall have the power *to subpoena witnesses, to take testimony under oath, to cause the deposition of witnesses residing within or without the state to be taken in a manner prescribed by law, and to assemble records and documents, by subpoena or otherwise.*" § 29.235.4(1) (emphasis added).

11. On December 4, 2019, the SAO filed the instant action, addressed to closed meeting records and certain portions of personnel files. To clear-up any misconceptions, a count for declaratory relief was included to address the underlying law the Commission appeared to be using in denying records access.

12. On December 11, 2019, approximately one week after the filing of this case, Counsel Hatley sent an e-mail to SAO counsel stating that the Commission would be producing some redacted closed minute records on the following day, but imposed vague limits on the extent to which the closed minutes were complete, subject to redactions. Ex. F, December 11, 2019 e-mail from Hatley to Anderson ("If something in the minutes relates to the receipt or expenditure of public funds, it is being disclosed unless it is attorney-client privileged or legal work product[.]")

13. On February 18, 2020, Counsel Hatley sent an e-mail to SAO trial counsel and to Clay County staff expressing "significant concerns" with allowing audit staff access to personnel records and to County personnel office staff due in part to Counsel's accusation that the State Auditor violated Missouri law: "Making matters worse is *the Auditor's recent violation of state law* through the attachment of work papers to the report of her audit of the former Attorney General. This gives us little confidence that the Auditor will respect the confidentiality of records she might obtain, if she believes releasing them will serve some other objective." Ex. G, February 18, 2020 e-mail from Hatley to Anderson (emphasis added).

14. When asked what law the Commission or Counsel Hatley believed had been violated, Counsel Hatley referred to § 29.200.17 and a December 31, 2019 letter from an assistant attorney general to the SAO, citing the same subsection and claiming that violation of that subsection is a felony. Ex. H, February 20, 2020 e-mail from Hatley to Anderson.

15. No section of Missouri law makes attachments to an audit report a felony or any other crime.

16. No section of Missouri law makes attachments to an audit report unlawful civilly.

17. There was no action or additional follow-up by the Attorney General's Office with respect to the letter attached by Counsel Hatley. Ex. H.

18. Counsel Hatley's accusation is without legal support as Missouri law does not make any conduct of the State Auditor a crime. Section 29.080 provides a criminal

penalty to audit examiners if information on the condition of an office is communicated to anyone other than the Auditor, but has no application to the release of an audit report by the State Auditor.

19. Counsel Hatley has accused SAO audit staff of unlawful behavior with no legal justification, and has informed Commission administration of his accusation.

20. A legal judgment by this Court rendered on the following questions can be made without the need to adduce facts at a hearing:

- (1) 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);
- (2) The State Auditor is not required by law to make a showing to an auditee that the content of a record is related to an audit so long as review of the record itself is related to a lawful audit;
- (3) The Missouri Constitution does not deny the State Auditor access to any particular record or any particular category of records;
- (4) In conducting an audit, the State Auditor and her authorized representatives have the power to subpoena witnesses and to take testimony under oath, and to assemble records and documents by subpoena or otherwise.
- (5) The publication of records as part of a public audit report does not violate § 29.200 as long as such records are not independently confidential by law.
- (6) Nothing in Chapter 29 makes the conduct of the State Auditor a crime of any kind.

## **Suggestions In Support of the Court Ruling on the Declaratory Judgment Count**

Resistance to audit efforts based upon unreasonably narrow interpretations of law gave rise to the filing of the instant case. While progress was made on this audit immediately after the filing of this case, trial counsel Hatley has made a false accusation that the State Auditor violated the law as part of an official communication about the audit. That false accusation presently serves to further impede the audit progress and has the potential to intimidate audit staff.

Two subpoenas are before this Court addressed to specific records that the State Auditor's staff needs to review. But to avoid delay in the completion of the audit, State Auditor's staff are continuing the audit in all respects other than those presently in legal dispute. Accusations of a crime by opposing counsel threaten to halt those efforts, further delaying answers for Clay County citizens.

The State Auditor's broad authority to review government records and interview government personnel in connection with an audit<sup>2</sup> has been challenged by the Clay County Commission as exceeding the Auditor's constitutional authority. As a result, closed minutes of Commission meetings have been withheld in their entirety for almost a year on a theory that the State Auditor is limited to conducting financial post-audits of books and accounts, and specifically not permitted to conduct "performance audits," even though such audits are provided for by statute. §§ 29.005(2), (5), (6); 29.185. This

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<sup>2</sup> Section 29.235: "The auditor and the auditor's authorized agents are authorized to: (1) Examine all books, accounts, records, reports, vouchers of any state agency or entity subject to audit, insofar as they are necessary to conduct an audit under this chapter[.]"

theory was put to the test and rejected in *Clay County Commission v. Galloway* (Cole County Case No. 19AC-CC00055, October 23, 2019, currently on appeal to the Western District, case no. WD83580), and the alleged performance audit prohibition theory was abandoned in the County's pleadings before this Court. *See* Answer of Defendants Clay County, Missouri and Nicole Brown to First Amended Petition, p. 1.

The events immediately triggering the filing of this action were the Commission's noncompliance with two subpoenas issued for records and testimony. While the Commission produced on November 7, 2019, nearly eleven months after the request, portions of closed minutes that had become open by operation of law, the Commission remained steadfast that those portions of the minutes closed under the Sunshine Law (Chapter 610, RSMo) were out-of-bounds for review by the State Auditor.

Almost immediately after the filing of the present action, and continuing through the status conference before this Court on January 31, 2020, the SAO staff experienced a significant increase in cooperation from the Commission and Defendant Brown: A portion of some records that have been withheld in their entirety since December of 2018 have been mostly produced.<sup>3</sup> On-site audit work that was initially resisted by County staff was permitted and work remains ongoing.

On February 18, 2020, however, Commission counsel Hatley sent an e-mail to the SAO and county staff expressing concern with allowing audit staff "unfettered access" to

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<sup>3</sup> The Commission refused all access to closed minutes of closed session meetings until just after this suit was filed. The Commission delivered some such minutes on December 12, 2019, though their completeness remains in question.



the human resources office and personnel. While concern of any auditee with the sensitivity of personnel records is one that SAO audit staff have and will accommodate to the greatest extent possible, Counsel Hatley made this unnecessary, out-of-bounds accusation:

*Making matters worse is the Auditor's recent violation of state law through the attachment of work papers to the report of her audit of the former Attorney General. This gives us little confidence that the Auditor will respect the confidentiality of records she might obtain, if she believes releasing them will serve some other objective.*

Exhibit G, February 18, 2020 e-mail from Hatley to Anderson and Nicole Brown (emphasis added). When asked to explain exactly what state law counsel and the Commission was accusing the Auditor of violating, Counsel Hatley cited, generally, § 29.200.17, attaching a letter from Attorney General Schmitt's general counsel that argued that the attachment of transcripts to an audit of the Attorney General's Office constituted a felony. In almost two months, there was no action or additional follow-up by the Attorney General's Office. Ex. H.

There is no reasonable reading of the law that would support such a conclusion. Section 29.200.17, states, "Except as provided in this section, audit workpapers and related supportive material shall be kept confidential, including any interpretations, advisory opinions, or other information or materials used and relied on in performing the audit." This section relates to the underlying documentation and other supportive material related to an audit, but not the report itself.

While no statute defines "audit workpapers and related supportive material," this phrase has a broad meaning. Workpapers are prepared by the examiner. Basically, audit

workpapers and other related supportive material includes any document or correspondence sent or received in the course of an audit, documents from the auditee, preparatory materials used by audit staff, documents created by staff in the course of an audit, draft reports, audit tracking, and other analysis or impressions related to the audit or the auditee. If the Commission's interpretation is taken to its logical conclusion, then no audit report could ever be published because the report and all of its content and language are also included in the workpapers. That is simply not the law in Missouri.

Under § 29.200.13, the State Auditor is required to produce a public report of her audits. As to the public report, the only limit is that "[n]othing in this subsection shall be construed to authorize or permit the publication of information that is otherwise prohibited by law from being disclosed." § 29.200.13.

Other provisions of law prevent the disclosure of certain information by this office. Section 32.057, specifically provides that the auditor shall "have no greater right of access to, use and publication of information, audit and related activities with respect to income tax information obtained by the department of revenue pursuant to chapter 143 or federal statute than specifically exists pursuant to the laws of the United States and of the income tax laws of the state of Missouri." § 32.057.4. Other laws are more general, such as the Family Educational Rights and Privacy Act (FERPA); 20 U.S.C. § 1232g; 34 CFR Part 99; and the Health Insurance Portability and Accountability Act of 1996 (HIPAA); Pub. L. 104-191. This office has never taken the position that it has the right to publish information that is otherwise prohibited from disclosure by law.

Such an accusation by an opposing counsel in a pending case and, as here, one who is speaking on behalf of an auditee in an official state audit, is worse than a return to discredited theories of limitations on the State Auditor's authority previously argued by the Commission. Counsel's accusation is unnecessary at best. But more practically, it is an officially stated platform from which further interference in audit work can be based and from which audit staff could potentially be intimidated in the performance of their duties. And arguments such as the ones made by the Commission's attorney may serve to embolden other auditees to refuse access to avoid scrutiny by the SAO.

The SAO requests an expedited hearing date on the declaratory judgment portion of its claim. Underlying this case is an ongoing citizen-mandated state audit of Clay County that remains in progress as this case pends. A dispute over two subpoenas gave rise to the filing of this case, but the underlying legal issues set forth in the declaratory judgment count form the basis for those subpoena disputes.

The SAO wishes to avoid as much delay as possible in the completion of this citizen-mandated audit. While the State Auditor has been moving ahead with as much of the audit work as possible, segregating out matters related to known legal disputes with the Commission, the injection of accusations of violation of laws, including criminal laws, on the part audit staff and the State Auditor specifically, greatly threatens that effort. While the notion that the State Auditor might have violated the law in releasing a public report that includes the underlying facts finds no statutory support whatsoever, § 29.080 provides for a felony-level crime that can be charged to an examiner who is appointed by the Auditor under § 29.060 for revealing information about the condition of

an office to anyone other than the State Auditor. Such baseless declarations on behalf of the Commission only add difficulty and expense to what should be a straight-forward process.

WHEREFORE, Plaintiff State Auditor requests that this Court order expedited briefing and a hearing on those portions of Plaintiff's declaratory judgment that pertain to the underlying audit work in Clay County, Missouri, or, alternatively, to set the matter for trial on an expedited briefing and trial schedule.

Respectfully submitted,

/s/ Joel E. Anderson

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### **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

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and related attachments were delivered via the Court's electronic filing system to attorneys of record:

W. Joseph Hatley  
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Kansas City, MO 64106

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