



# A Win for Open and Transparent Government in Missouri

June 30, 2021

In a win for open and transparent government in Missouri, the Missouri Supreme Court ruled that the Missouri Sunshine Law prohibits public governmental bodies from charging persons who request public records under the Missouri Sunshine Law for the cost of having government attorneys review the records for privileged or protected material — and instead held these costs must be borne by the government.

In 2018, Plaintiff Elad Gross made a request for public records under the Missouri Sunshine Law (RSMo. § § 610.010, *et seq.*) to the Governor's Office as part of an investigation into the use of "dark money" in Missouri. The Governor's Office demanded that Mr. Gross pay \$3,618.40 for the time of a staff attorney in the Governor's Office to review the records before they would be produced.

Instead of acceding to what he believed was an illegal demand, Mr. Gross filed suit against the Governor's Office in Cole County, Missouri Circuit Court. The Circuit Court rejected Mr. Gross' claims and granted judgment on the pleadings. On appeal, the Missouri Court of Appeals for the Western District issued a splintered opinion which did little to resolve the issue. Fortunately, however, the Missouri Supreme Court granted transfer.

In the Missouri Supreme Court, Bernie Rhodes filed an amicus brief on behalf of *The Kansas City Star* and the *St. Louis Post-Dispatch* in support of Mr. Gross' position that the Sunshine Law does not allow government agencies to pass on to requesters the cost of having a government attorney review documents. In the brief, Mr. Rhodes explained that the Sunshine Law permits public governmental bodies to charge the requestor *specific* fees associated with complying with the request, but that attorney review time is not included in the type of fees that can be charged.

In response, the Governor's Office argued that attorney review time was either "research" under § 610.026 (1) or "staff time" under § 610.026(2), which are allowable costs. Thus, the specific question presented was: Could the Governor's Office charge Mr. Gross for the government attorney's time reviewing the public records for privileged or work product material as "research time" or "staff time"? The Court's response: No.

First, the Court noted that although attorney review time could conceivably be considered within the definition of "research," the statute qualifies that the "research" time that may be charged must be "research



time required for fulfilling records requests." § 610.026(1). The Court said that attorney review time is not "required for fulfilling records requests." Specifically, the Court zeroed in on the portion of the Sunshine Law that provides that where public records contain material that is both exempt and not exempt from disclosure, "the public governmental body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." § 610.024.1. The Court held that "because the Sunshine Law obligates a public governmental body to separate exempt and nonexempt material without regard to any particular records request, attorney review time to determine whether responsive documents contain privileged information is not '[r]esearch time required for fulfilling records requests'" within the meaning of section 610.026(1) (Opinion p. 13).

The Court also held that attorney review time could not constitute "staff time" under section 610.026(2). While the plain meaning of "staff" is broad enough to include staff attorneys, when considered in the context of the statute as a whole, the only "staff time" permitted is the time required to provide "access to public records." Attorney review time plays no role in providing "access" to public records.

This is a tremendous victory for open and transparent government in Missouri. With increasing frequency, public governmental bodies have been demanding that members of the public pay hundreds, thousands, and even tens of thousands of dollars in "attorney review time" before the agency would provide otherwise public records. These steep financial hurdles caused many requesters to abandon their requests altogether.

We suggest that if you have previously made a Sunshine Law request to a Missouri governmental body and have received a demand for payment of attorney review time, you should make a new request. Any attempt by the agency to now charge for such attorney time would be plainly improper and would allow you to assert a claim against the agency for a knowing or purposeful violation of the Sunshine Law — which, interestingly enough, would entitle you to recover *your* attorney's fees from the government if you had to sue them.

For more information, please contact Bernie Rhodes, Taryn Nash, or your regular Lathrop GPM contact.

*Gross v. Michael Parson*, No. SC98619 (June 29, 2021)