IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
CIVIL DIVISION

BROOKE SCHREIER GANZ, both individually and as an authorized representative of RECLAIM THE RECORDS, a non-profit, unincorporated association,	)	
Plaintiffs,	)	
	)	Case No.16AC-CC00503
vs.	)	
MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES,	)	
Defendant.	)	

AMENDED MEMORANDUM AND FINAL JUDGMENT

The Court takes up (1) Plaintiffs Reclaim the Records and Brooke Schreier Ganz's motion for summary judgment, (2) Defendant Missouri Department of Health and Senior Services' ("DHSS") motion for summary judgment, (3) DHSS' motion for leave to supplement its opposition to Plaintiffs' motion for summary judgment, and (4) Plaintiffs' motion to amend the Court's original judgment to include an award of attorney's fees and costs. For the reasons stated below, the Court sustains Plaintiffs' motion for summary judgment, denies both Defendant's motion for summary judgment and its motion for leave, and grants Plaintiffs' motion to set the amount of attorney's fees and costs.

Summary Judgment Standards

"The purpose of summary judgment … is to identify cases (1) in which there is no genuine dispute as to the facts and (2) the facts as admitted show a legal right to judgment for the movant." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993); *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 453 (Mo. banc

2011) (summary judgment proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law).

A party moving for summary judgment is required to attach to its motion a statement of uncontroverted material facts which sets forth, with particularity and in separately numbered paragraphs, each material fact as to which movant claims there is no genuine issue. Mo. Sup. Ct. R. 74.04(c)(1). The party opposing the motion must then admit or deny each of the movant's factual statements and must support each denial with specific references to the record, or the fact is deemed admitted. *See Cent. Tr. & Inv. Co. v. Signalpoint Asset Mgmt., LLC*, 422 S.W.3d 312, 320, 322 (Mo. banc 2014) ("[T]he non-movant must support denials with specific references to discovery, exhibits, or affidavits demonstrating a genuine factual issue for trial. Facts not properly supported … are deemed admitted.") (citation omitted); *Old Republic Nat'l Title Ins. Co. v. Cox*, 453 S.W.3d 780, 786 (Mo. App. 2014) ("failure to deny the allegations and reference a document showing a genuine dispute results in [the] admission of these assignments").

Here, DHSS admitted nearly all of Ms. Ganz's factual statements. As to a few statements, DHSS asserted the facts are immaterial, but failed to controvert the truth of such statements. As a result, the Court considers those facts to be true. *See Blackwell Motors, Inc. v. Manheim Servs. Corp.*, 529 S.W.3d 367, 379 (Mo. App. 2017) (finding denial of facts was ineffectual where only basis for denial was non-movant's assertion the facts were irrelevant and immaterial); *Lindsay v. Mazzio's Corp.*, 136 S.W.3d 915, 920 (Mo. App. 2004) (same).

In those few instances in which DHSS properly controverted a factual statement, the Court has adopted DHSS' version of the facts. *See ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993) ("When considering

appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered.").

Findings of Fact

Against this backdrop, the Court finds the following facts to be uncontroverted.

Reclaim the Records

1. Plaintiff Brooke Schreier Ganz is the founder, and current President, of Reclaim the Records, a non-profit association of genealogists, historians, researchers, journalists, and open government advocates committed to making genealogical data readily available to the public for free. (Def. Resp. to Pl. SOF ¶ 1).

2. Ms. Ganz is a genealogist and computer programmer who began Reclaim the Records in 2015 out of her frustration with getting historical marriage license indexes from the New York City Municipal Archives. (Def. Resp. to Pl. SOF ¶ 2).

3. When the Archives refused to provide her with copies of the indexes, Ms. Ganz became the first known genealogist in the United States to successfully sue a government archive using a state Freedom of Information law for the return of records to the public. (Def. Resp. to Pl. SOF ¶ 3).

4. Ms. Ganz then had the microfilm copies she won from the Archives digitally scanned, and then uploaded the new digital images to the Internet Archive, a non-profit online library, for free public use. She also later created a website and posted the marriage indexes online, where they are available for free. (Def. Resp. to Pl. SOF ¶ 4).

5. Since then, Ms. Ganz and Reclaim the Records have continued to use state and federal open records laws to obtain copies of important genealogical data sets and post those records online for free. (Def. Resp. to Pl. SOF ¶ 5).

6. In addition, where necessary, Ms. Ganz and Reclaim the Records have brought open records lawsuits to reclaim public records, as they have here. (Def. Resp. to Pl. SOF ¶ 6).

7. Once the group reclaims these records, they are made available for free to the public, which uses them for finding family members, tracing family lineage, preparing family trees, and much more. (Def. Resp. to Pl. SOF ¶ 7).

8. Since its founding, the group has reclaimed more than 28 million records for the public's benefit. (Def. Resp. to Pl. SOF ¶ 8).

9. In February 2017, the group became a 501(c)(3) non-profit organization. (Def. Resp. to Pl. SOF ¶ 9).

10. The group's board of directors includes a Fellow of the American Society of Genealogists (membership is limited to only 50 living fellows); the former Chief Technology Officer of FamilySearch, the largest genealogy organization in the world, which is operated by The Church of Jesus Christ of Latter-day Saints; and a forensic consultant to the U.S. Army who conducts genealogical research to identify potential family members of unaccounted soldiers from World War I, World War II, Korea and Vietnam for possible DNA matches with soldier's remains recovered from the battlefield. (Def. Resp. to Pl. SOF ¶ 10).

11. As founder and President of Reclaim the Records, Ms. Ganz will fairly and adequately represent the interests of the group's members. (Def. Resp. to Pl. SOF ¶ 11).

The Sunshine Law Requests

12. On Saturday, February 13, 2016, Ms. Ganz, on behalf of Reclaim the Records, e-mailed two Missouri Sunshine Law requests to Defendant Missouri Department of Health and Senior Services. (Def. Resp. to Pl. SOF ¶ 12).

13. One request was for Missouri birth listings for the period January 1, 1910, through December 31, 2015, while the second request was for Missouri death listings for the same period. (Def. Resp. to Pl. SOF ¶ 13).

14. In her requests, Ms. Ganz expressly stated, "this is a request for just the basic index to the [births/deaths], and is not a request for any actual [birth/death] certificates." (Def. Resp. to Pl. SOF ¶ 14).

15. On Wednesday, February 17, 2016, Nikki Loethen, DHSS' General Counsel, reviewed the two requests and directed Emily Hollis (also in the DHSS Office of General Counsel) to "do the 3-day response" for each request. (Def. Resp. to Pl. SOF ¶ 15).

16. Ms. Loethen's reference to "the 3-day response" is to Section 610.023.3 of the Missouri Revised Statutes, which provides as follows: "Each request for access to a public record shall be acted upon as soon as possible, but in no event later than the end of the third business day following the date the request is received by the custodian of records of a public governmental body." Mo. Rev. Stat. § 610.023.3.

17. Later that same day, Ms. Hollis sent two otherwise identical e-mails to Ms. Ganz—one e-mail in response to the request for birth listings and the other in response to the request for death listing. (Def. Resp. to Pl. SOF ¶ 17).

18. In her e-mails, Ms. Hollis stated that "[t]he Department is working to fill your request" and said that payment of research and copy charges may be required "prior to your receipt of the requested records." (Def. Resp. to Pl. SOF ¶ 18).

19. A copy of Ms. Hollis' e-mail to Ms. Ganz is below:

From: Hollis, Emily 02/17/2016

Subject: FW: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2016

Dear Ms. Ganz:

The Missouri Department of Health and Senior Services (Department) is in receipt of your request dated February 16, 2016 for a listing of persons born in the State of Missouri between January 1, 1910 and December 31, 2015. You have requested that this list include the sex and birth certificate number of each person.

The Department is working to fill your request. Due to the number of records to be reviewed, and day to day business, it is estimated that a response will be provided to you on or after March 31, 2016, Please note, the Department may charge $21.38 per hour for research and $.10 per page for records. An invoice may be sent to you for any charges in the fulfillment of your request prior to your receipt of the requested records.

If you have any questions, please contact our office at (573) 751-6005. Thank you.

Emily E. Hollis
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Dept. of Health & Senior Services
P.O. Box 570
Jefferson City, MO 65102
Phone: (573) 751-6005
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Email: Emily.Hollis@health.mo.gov<mailto:Emily.Hollis@health.mo.gov>

(Def. Resp. to Pl. SOF ¶ 19) (highlighting added).

20. The same day, Ms. Hollis wrote two employees in DHSS' Division of Community and Public Health with directions to "[p]lease begin collection of records." (Def. Resp. to Pl. SOF ¶ 20).

Ms. Ganz follows up

21. On April 18, 2016, when Ms. Ganz had still not received either the birth and death listings—or a cost estimate for the listings—she again e-mailed DHSS to follow up on her requests. (Def. Resp. to Pl. SOF ¶ 21).

22. On April 26, 2016, Ms. Ganz received an e-mail from Dr. Loise Wambuguh who asked Ms. Ganz to contact her about her requests. (Def. Resp. to Pl. SOF ¶ 22).

23. On April 27, 2016, Ms. Ganz spoke by telephone with Dr. Loise Wambuguh, who is the acting Bureau Chief for the Bureau of Vital Statistics in DHSS' Division of Community and Public Health. (Def. Resp. to Pl. SOF ¶ 23).

24. Dr. Wambuguh told Ms. Ganz that DHSS' birth listings only went back to 1920. (Def. Resp. to Pl. SOF ¶ 24).

25. Dr. Wambuguh also told Ms. Ganz that DHSS' death listings only went back to 1968—and that death records prior to 1968 had previously been transferred to the Missouri State Archives. (Def. Resp. to Pl. SOF ¶ 25).

26. Dr. Wambuguh also told Ms. Ganz that DHSS would provide names and the date of birth or death, but would not provide either the gender of the person or a birth/death certificate number (which Ms. Ganz had stated in original request she would like to have if available). (Def. Resp. to Pl. SOF ¶ 26).

27. In response, Ms. Ganz agreed to modify her requests in accordance with these date parameters, and to remove her request for gender and for certificate numbers. (Def. Resp. to Pl. SOF ¶ 27).

28. At no time during the call did Dr. Wambuguh ever state that DHSS had denied the requests. (Def. Resp. to Pl. SOF ¶ 28).

29. Dr. Wambuguh concluded the call by stating that someone would be getting back to Ms. Ganz with a cost estimate. (Def. Resp. to Pl. SOF ¶ 29).

Ms. Ganz follows up again

30. On May 23, 2016, Ms. Ganz called Dr. Wambuguh and left her a voicemail stating that she was still waiting for a cost estimate. (Def. Resp. to Pl. SOF ¶ 30).

31. Shortly thereafter, Ms. Loethen (DHSS' General Counsel) called Ms. Ganz. (Def. Resp. to Pl. SOF ¶ 31).

32. During that call, Ms. Loethen discussed Ms. Ganz's requests with her. (Def. Resp. to Pl. SOF ¶ 32).

33. Ms. Loethen also told Ms. Ganz that DHSS was still working to provide her with a cost estimate for her requests. (Def. Resp. to Pl. SOF ¶ 33).

34. At no time during the call did Ms. Loethen ever state that DHSS had denied the requests, or was considering denying the requests. (Def. Resp. to Pl. SOF ¶ 34).

35. On May 27, 2016, Ms. Loethen wrote Ms. Ganz an e-mail confirming her phone conversation with Ms. Ganz. (Def. Resp. to Pl. SOF ¶ 35).

36. In her e-mail, Ms. Loethen stated that DHSS was still working on a cost estimate for fulfilling Ms. Ganz's requests pursuant to Chapter 610, RSMo, and stated that the cost estimate would be provided in approximately five business days. (Def. Resp. to Pl. SOF ¶ 36).

37. Chapter 610 of the Missouri Revised Statutes of Missouri is the Missouri Sunshine Law. *See* Mo. Rev. Stat. § 610.010, *et seq*.

38. At no point in the e-mail did Ms. Loethen state that DHSS had denied Ms. Ganz's request, or that it was considering denying the requests. (Def. Resp. to Pl. SOF ¶ 38).

39. A copy of Ms. Loethen's e-mail is set forth below:

From: Loethen, Nikki 05/27/2016

Subject: FW: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2016

Dear Ms. Ganz:

As we discussed, the department is working to confirm a cost estimate of fulfilling your request for a list of people who were born and died on each day from 1910 - 2015. The department may not have the information for the earlier years of the request but is checking. The department will charge for staff time (and programmer time if necessary) as authorized by Chapter 610, RSMo. The department's current hourly rate for staff time is $20.85 per hour. The department understands that you want to receive the information electronically and is checking on whether it is possible to provide the information in that format, rather than on paper. The cost estimate will be provided to you within approximately five business days.

Sincerely,

Nikki Loethen
General Counsel
Deptartment of Health & Senior Services
921 Wildwood Drive
Jefferson City, MO 65102
Phone: 573.751.6005
Facsimile: 573.751.0247

(Def. Resp. to Pl. SOF ¶ 39) (highlighting added).

Trolling for Information on Reclaim the Records

40. On June 15, 2016, Dr. Wambuguh attended a meeting with other members of DHSS' Division of Community and Public Health concerning Ms. Ganz's requests. (Def. Resp. to Pl. SOF ¶ 40).

41. Craig Ward, the DHSS State Registrar, was invited to attend the meeting, but he was out of the office and did not return until the next day, June 16, 2016. (Def. Resp. to Pl. SOF ¶ 41).

42. The following day, June 17, 2016, Mr. Ward sent a series of e-mails to contacts at other state and city health departments scheduling phone calls with each of them to obtain information about Reclaim the Records. (Def. Resp. to Pl. SOF ¶ 42).

DHSS' Cost Estimates

43. Meanwhile, on June 22, 2016, Ms. Ganz sent Ms. Loethen an e-mail seeking information as to the status of her requests. (Def. Resp. to Pl. SOF ¶ 43).

44. Two days later, on June 24, 2016, Ms. Hollis responded to Ms. Ganz's requests with a cost estimate of $1.49 million, which she stated was pursuant to Section 610.026, RSMo (the Missouri Sunshine Law).

From: Hollis, Emily 06/24/2016

Subject: RE: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2016

Dear Ms. Ganz:

Pursuant to your request for an estimate and Section 610.026, RSMo, compliance with the two records requests below is estimated to cost the following:

Birth list: $993,480 (23,376 hours at $42.50/hour)
Death list: $496,740 (11,688 hours at $42.50/hour)

Thank you.

Emily E. Hollis
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(Def. Resp. to Pl. SOF ¶ 44) (highlighting added).

45. DHSS' estimate assumed it would take 35,064 hours (or more than four years of someone working 24 hours a day, seven days a week) to retrieve the records. (Def. Resp. to Pl. SOF ¶ 45).

46. On June 28, 2016, Ms. Loethen sent Ms. Ganz an e-mail revising the hourly rate by 72¢ an hour, but maintaining it would still take 35,064 hours of DHSS staff time to provide the listings.

From: Loethen, Nikki 06/28/2016

Subject: RE: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2016

Dear Ms. Ganz:

After the email below was sent to you, the department realized an error in the calculation of the hourly rate. Here are the revised estimates based on the corrected rate:

Birth list: $976,649.28 (23,376 hours at $41.78/hour)
Death list: $488,324.64 (11,688 hours at $41.78/hour)

Sincerely.

Nikki Loethen
General Counsel
Deptartment of Health & Senior Services
921 Wildwood Drive
Jefferson City, MO 65102
Phone: 573.751.6005
Facsimile: 573.751.0247

(Def. Resp. to Pl. SOF ¶ 46 (highlighting added)).

Ms. Ganz retains counsel

47. Ms. Ganz retained counsel, Bernard Rhodes of Lathrop Gage, to assist her in obtaining the records. (Def. Resp. to Pl. SOF ¶ 47).

48. On June 28, 2016, Mr. Rhodes spoke by telephone with Ms. Loethen, who advised Mr. Rhodes that the $1.49 million cost estimate was based on separate searches for each day of the two relevant periods, *i.e.*, the 96-year period for the birth listings (1920-2015), and the 48-year period for the death listings (1968-2015). (Def. Resp. to Pl. SOF ¶ 48).

49. In response, Mr. Rhodes advised Ms. Loethen that the $1.49 million cost estimate violated the Sunshine Law, which expressly provides that the only allowable charges are the actual time it takes a staff member to retrieve the records from the database. (Def. Resp. to Pl. SOF ¶ 49).

50. Mr. Rhodes also asked Ms. Loethen to provide him information as to the type of database DHSS used to maintain the birth and death lists so that he could propose a search methodology consistent with the Sunshine Law. (Def. Resp. to Pl. SOF ¶ 50).

51. On July 7, 2016, Ms. Loethen sent Mr. Rhodes an e-mail advising that DHSS maintains the listings on an IBM mainframe computer in a flat file database. (Def. Resp. to Pl. SOF ¶ 51).

52. On July 12, 2016, Mr. Rhodes sent Ms. Loethen an e-mail and explained how—using the information Ms. Loethen had provided about DHSS' computer system—the two listings could be produced by using two simple date range searches, *i.e.*, one search for the birth records and one search for the death records. (Def. Resp. to Pl. SOF ¶ 52).

53. On July 22, 2016, when Mr. Rhodes had not received any response from Ms. Loethen, he sent a follow-up e-mail to her. (Def. Resp. to Pl. SOF ¶ 53).

54. Later that same day, Ms. Loethen responded that she was still waiting to hear from DHSS staff "whether lists compliant with Section 193.245 could be created in fewer hours," utilizing the methodology proposed by Mr. Rhodes. (Def. Resp. to Pl. SOF ¶ 54).

DHSS' Revised Cost Estimate

55. On August 1, 2016, when Mr. Rhodes had not received a response from Ms. Loethen as to whether the birth and death listings could be created using the method he proposed, he sent a follow-up e-mail to Ms. Loethen. (Def. Resp. to Pl. SOF ¶ 55).

56. Later that same day, Ms. Loethen sent Mr. Rhodes an e-mail dramatically revising the cost estimate from $1,464,973.92 to $5,174.04.

Rhodes, Bernie

From: Loethen, Nikki <Nikki.Loethen@health.mo.gov>
Sent: Monday, August 01, 2016 10:58 AM
To: Rhodes, Bernie
Subject: RE: Missouri Sunshine Law Request: Request for the Missouri birth index, 1910-2015

Staff has determined that they can run the lists for one year at a time versus one day at a time as originally estimated, which drastically reduces the cost estimate (see below). However, I have asked them to determine whether it is possible to run all the years at a time, thereby further reducing the estimate. If running all the years at a time is not possible, I have asked them to explain why. I will let you know what I learn. The original estimate was based on a misunderstanding regarding what the statute allows in terms of providing a list for a particular date.

Birth lists: 72 hours at $41.78/hour = $3,008.16
Death lists: 51.84 hours at $41.78.hour = $2,165.88

Nikki Loethen
General Counsel
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Jefferson City, MO 65102
Phone: 573.751.6005
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(Def. Resp. to Pl. SOF ¶ 56 (highlighting added)).

57. In her e-mail, Ms. Loethen explained the difference between the two estimates by stating that "[s]taff has determined that they can run the lists for one year at a time versus one day at a time as originally estimated." (Def. Resp. to Pl. SOF ¶ 57).

58. Ms. Loethen also stated that she had asked DHSS staff to research whether it was possible—as Mr. Rhodes had stated—to run all the years in one search, and said that

if staff said such a search could not be run, "I have asked them to explain why." (Def. Resp. to Pl. SOF ¶ 58).

59. Ms. Loethen told Mr. Rhodes, "I will let you know what I learn." (Def. Resp. to Pl. SOF ¶ 59).

The Secret Plan to Deny the Sunshine Law Requests

60. On July 21, 2016—while Mr. Rhodes and Ms. Loethen were corresponding about search methodologies that would comply with the Sunshine Law—Dr. Wambuguh spoke with Garland Land, the former State Registrar, about Ms. Ganz's requests. (Def. Resp. to Pl. SOF ¶ 60).

61. Later the same day, Mr. Land wrote Dr. Wambuguh and told her that DHSS should deny Ms. Ganz's requests, and "require them to take you to court," and to use the delay caused by the lawsuit to get the Legislature to change the law.

> I would not honor the request. I would require them to take you to court and then bring in national geneological and vital records experts to testify why making indexes is not good public policy. By delaying this you might file a regulation or get the Legislature to clarify the intent of the law.

(Def. Resp. to Pl. SOF ¶ 61) (highlighting added).

62. The next day, Dr. Wambuguh wrote Mr. Land and advised him that she would "share … this useful advice … with my colleagues." (Def. Resp. to Pl. SOF ¶ 62).

DHSS Executes the Secret Plan – Part 1

63. Exactly two weeks later, on August 9, 2016, Ms. Loethen wrote Mr. Rhodes and—rather than providing information as to whether it was possible to run just two searches, as she stated she would do in her August 1st e-mail—advised him that DHSS was denying both Ms. Ganz's request for birth listings and her request for death listings, and was refusing to provide either listing, stating that "the department has opted to exercise the

discretion granted in Section 193.245(1), RSMo, to decline these requests." (Def. Resp. to Pl. SOF ¶ 63).

64. The decision to deny Ms. Ganz's requests had been made the day before, on August 8, 2016, exactly two weeks after Mr. Land's e-mail advising DHSS to "not honor the request [and] require them to take you to court." (Def. Resp. to Pl. SOF ¶ 64).

65. The decision to deny Ms. Ganz's requests came nearly six months after Ms. Ganz made her requests. (Def. Resp. to Pl. SOF ¶ 65).

DHSS Executes the Secret Plan – Part 2

66. On August 22, 2016, less than two weeks after DHSS denied Ms. Ganz's requests, Mr. Ward—who previously had sought information from his contacts at other health departments about Reclaim the Records—e-mailed his contacts and advised them that DHSS had denied Ms. Ganz's requests. (Def. Resp. to Pl. SOF ¶ 66).

67. He also advised them that not only had DHSS denied Ms. Ganz's request, but that DHSS had also "submitted a legislative request to rescind the particular statute." (Def. Resp. to Pl. SOF ¶ 67).

68. Mr. Ward then wrote: "I'm hoping that's the end of it." (Def. Resp. to Pl. SOF ¶ 68).

Ms. Ganz's Counsel Responds to the Denial

69. But that was not the end of it, because on August 24, 2016, Mr. Rhodes sent Ms. Loethen an 11-page letter advising her that (a) DHSS' reversal of its position was contrary to the Missouri Sunshine Law, and (b) Ms. Ganz intended to pursue litigation—and to seek penalties and attorneys' fees for DHSS' purposeful violation of the Sunshine Law—unless DHSS provided the requested records at actual cost. (Def. Resp. to Pl. SOF ¶ 69).

70. Ms. Loethen never responded to Mr. Rhodes' letter. (Def. Resp. to Pl. SOF ¶ 70).

DHSS Executes the Secret Plan – Part 2 (Continued)

71. As stated in Mr. Ward's e-mail, DHSS did in fact put forward a request to the Missouri Legislature to remove the provision from Missouri law providing that birth and death listings are available upon request. (Def. Resp. to Pl. SOF ¶ 71).

72. Specifically, DHSS lobbied to have the Missouri Legislature remove the provision in Section 193.245 that provides that birth and death listings are available upon request. (Def. Resp. to Pl. SOF ¶ 72).

73. Despite DHSS' efforts, Section 193.245.1 has not been amended since DHSS denied Plaintiffs' Sunshine Law requests. (Def. Resp. to Pl. SOF ¶ 73).

74. As late as July 2018, DHSS was considering renewing its request to change the law. (Def. Resp. to Pl. SOF ¶ 74).

75. DHSS' attempt to change Missouri law through the legislative process to close birth and death listings while this lawsuit has been pending is precisely what Mr. Land advised DHSS to do: "By delaying this you might file a regulation or get the Legislature to clarify the intent of the law." (Def. Resp. to Pl. SOF ¶ 75).

DHSS' Past Practice Was to Regularly Provide Birth and Death Listings

76. Before DHSS denied Ms. Ganz's requests, it regularly satisfied requests for birth and death listings for one day. (Def. Resp. to Pl. SOF ¶ 76).

77. In fact, in just the three years before Ms. Ganz made her requests, DHSS provided somewhere between 50 and 100 such listings to various requestors. (Def. Resp. to Pl. SOF ¶ 77).

78. These listings included the first name, last name, and date of birth of every person who was born or died in Missouri on a given date. (Def. Resp. to Pl. SOF ¶ 78).

79. If the request asked for more than one date, the listing would provide the same information for each date of the request. (Def. Resp. to Pl. SOF ¶ 79).

80. DHSS placed no restrictions on the use of these listings. (Def. Resp. to Pl. SOF ¶ 80).

DHSS Has Stopped Providing Birth and Death Listings

81. Since DHSS denied Ms. Ganz's requests, it has stopped providing birth and death listings, and sought an amendment to the Missouri statutes to close such listings. (Def. Resp. to Pl. SOF ¶ 81).

DHSS' Shifting Hourly Rate Charges

82. When Ms. Hollis, from the DHSS Office of General Counsel, first acknowledged receipt of Ms. Ganz's Sunshine Law requests on February 17, 2016, she advised that "the Department may charge $21.38 per hour for research."

> The Department is working to fill your request. Due to the number of records to be reviewed, and day to day business, it is estimated that a response will be provided to you on or after March 31, 2016, Please note, the Department may charge $21.38 per hour for research and $.10 per page for records. An invoice may be sent to you for any charges in the fulfillment of your request prior to your receipt of the requested records.

(Def. Resp. to Pl. SOF ¶ 82) (highlighting added).

83. On May 27, 2016, Ms. Loethen, DHSS' General Counsel, wrote Ms. Ganz as stated: "The department's current hourly rate for staff time is $20.85."

> As we discussed, the department is working to confirm a cost estimate of fulfilling your request for a list of people who were born and died on each day from 1910 - 2015. The department may not have the information for the earlier years of the request but is checking. The department will charge for staff time (and programmer time if necessary) as authorized by Chapter 610, RSMo. The department's current hourly rate for staff time is $20.85 per hour. The department understands that you want to receive the information electronically and is checking on whether it is possible to provide the information in that format, rather than on paper. The cost estimate will be provided to you within approximately five business days.

(Def. Resp. to Pl. SOF ¶ 83) (highlighting added).

84. However, when Ms. Hollis sent the first cost estimate of $1.49 million on June 24, 2016, it set forth charges of "42.50/hour."

> Pursuant to your request for an estimate and Section 610.026, RSMo, compliance with the two records requests below is estimated to cost the following:
>
> Birth list: $993,480 (23,376 hours at $42.50/hour)
> Death list: $496,740 (11,688 hours at $42.50/hour)

(Def. Resp. to Pl. SOF ¶ 84) (highlighting added).

85. Moreover, as can be seen above, Ms. Hollis expressly stated in her e-mail that the $42.50 hourly charge was prepared pursuant to Chapter 610 of the Missouri Statutes—just as Ms. Loethen had stated in her e-mail of May 27, 2016. (Def. Resp. to Pl. SOF ¶ 85).

86. On June 28, 2016, Ms. Loethen sent a revised cost estimate of $1.46 million, in which she changed the hourly rate from $42.50 to "$41.78/hour." (Def. Resp. to Pl. SOF ¶ 86).

87. Ms. Loethen based the difference on the fact "the department realized an error in the calculation of the hourly rate." (Def. Resp. to Pl. SOF ¶ 87).

88. When Ms. Loethen provided the cost of estimate of $5,174.04 on August 1, 2016, it was based on the same "$41.78 hour" rate used in her June 28, 2016, cost estimate of $1.46 million.

> Birth lists: 72 hours at $41.78/hour = $3,008.16
> Death lists: 51.84 hours at $41.78.hour = $2,165.88

(Def. Resp. to Pl. SOF ¶ 88) (highlighting added).

DHSS miscalculated the "average hourly rate of pay"

89. The Missouri Sunshine Law provides that a public governmental agency may charge for staff time to produce records maintained on computer facilities. Mo. Rev. Stat. § 610.026.1(2). (Def. Resp. to Pl. SOF ¶ 89).

90. Specifically, Section 610.026 provides as follows:

> Fees for providing access to public records maintained on computer facilities … shall include **only** the cost of copies, **staff time, which shall not exceed the average hourly rate of pay for staff** of the public governmental body required for making copies and programming, if necessary, and the cost of the disk, tape, or other medium used for the duplication.

Mo. Rev. Stat. § 610.026.1(2) (emphasis added); (Def. Resp. to Pl. SOF ¶ 90).

91. The work to be performed responding to Ms. Ganz's request was work that would have been performed by one or more DHSS Research Analysts. (Def. Resp. to Pl. SOF ¶ 91).

92. Specifically, the work would have been performed by persons with the job title Research Analyst III. (Def. Resp. to Pl. SOF ¶ 92).

93. Omitted.

94. Omitted.

95. The average hourly rate of pay for person with the job title of Research Analyst III in 2016 was $20.65. (Def. Resp. to Pl. SOF ¶ 95).

96. When DHSS provided its fee estimates to Ms. Ganz, it began with an hourly rate of pay of $22.61 per hour, which was mistakenly calculated by taking the "average" and the "maximum" rate of pay of the highest paid class and averaging those numbers. (Def. Resp. to Pl. SOF ¶ 96).

DHSS' hourly rate calculations include "additions"

97. Additionally, when DHSS provided its fee estimates to Ms. Ganz it added amounts in addition to the hourly rate of $22.61. (Def. Resp. to Pl. SOF ¶ 97).

98. To begin with, DHSS took the "direct PS [i.e. Pay Scale] rate" of $22.61 and then added $10.70 an hour in "fringe benefits." (Def. Resp. to Pl. SOF ¶ 98).

99. This fringe benefit factor is a "generalized rate" for every employee in DHSS. (Def. Resp. to Pl. SOF ¶ 99).

100. DHSS then took the sum of (a) the hourly rate of staff pay and (b) the fringe benefit factor, and multiplied the sum of those two numbers by an "indirect allocation" of general administrative expense factor of 20.9%, or another $6.96 an hour. (Def. Resp. to Pl. SOF ¶ 100).

101. DHSS then added to that number a "network" charge of $.93 per hour, and a "server" charge of $0.58 per hour. (Def. Resp. to Pl. SOF ¶ 101).

102. The total of these charges equals the $41.78 hourly charge that DHSS expected Ms. Ganz to pay.

Actual hourly rate	$22.61
Fringe benefits	$10.70
Indirect allocation	$6.96
Network charge	$0.93
Server charge	$0.58
Total	**$41.78**

(Def. Resp. to Pl. SOF ¶ 102).

103. As can be seen, the additions to the actual hourly rate nearly doubled the hourly charge DHSS expected Ms. Ganz to pay. (Def. Resp. to Pl. SOF ¶ 103).

The Actual Cost of Producing the Listings

104. Ms. Loethen's August 1, 2016, cost estimate of $5,174.04 was based on searches for one year at a time. (Def. Resp. to Pl. SOF ¶ 104).

105. Specifically, the estimate for the birth listings was based on 96 separate searches (for each of the years 1920 through 2015) at an estimated time per search of .75 hours, while the estimate of the death listings was based on 48 separate searches (for each of the years 1968 through 2015) at an estimated time per search of 1.08 hours. (Def. Resp. to Pl. SOF ¶ 105).

106. Omitted.

107. Omitted.

108. Omitted.

109. Omitted.

110. Omitted.

111. Omitted.

112. If Ms. Loethen had used the actual "average hourly rate of pay for staff" of $20.65 for a Research Analyst III, the total cost of providing the birth listings by performing 96 separate yearly searches at .75 hours each would have been $1,486.80 (72 hours x $20.65 an hour), while the total cost of providing the death listings by performing 48 separate yearly searches at 1.08 hours would have been $1,070.50 (51.84 hours x $20.65 an hour). (Def. Resp. to Pl. SOF ¶ 112).

113. Based on these calculations, the combined total for both listings would have been $2,557.30, or less than half of DHSS' last estimate of $5,174.04—or roughly three-

tenths of one percent of DHSS' original $1.49 million estimate. (Def. Resp. to Pl. SOF ¶ 113).

Conclusions of Law

Plaintiffs allege that DHSS violated the Sunshine Law in two ways. First, Plaintiffs allege that DHSS violated the Sunshine Law by initially charging nearly $1.5 million for the requested records, and by later charging more than $5,000 for the records—which was still more than double the allowable cost under the Sunshine Law. Second, Plaintiffs allege that DHSS violated the Sunshine Law by later denying Plaintiffs' requests outright, following the two cost estimates and six months after the initial request.

Because Plaintiffs' claims of excessive cost would be moot if DHSS had validly denied Plaintiffs' requests, the Court will first address whether DHSS properly denied Plaintiffs' requests.

I. The requested listings are "public records" under the Sunshine Law

The Missouri Sunshine Law states simply: "Except as otherwise provided by law, … all public records of public governmental bodies **shall be open** to the public for inspection and copying." Mo. Rev. Stat. § 610.011.2 (emphasis added). As such, Sunshine Law issues are settled by the answers to three questions: (1) is the requested document a "public record," (2) "of [a] public governmental bod[y]," and (3) is the record "otherwise [closed] by law."

The Sunshine Law defines a "public record" as "any record, whether written or electronically stored, retained by or of any public governmental body." Mo. Rev. Stat. § 610.010(6). DHSS does not dispute that it maintains listings of persons who were born and died in Missouri pursuant to its statutory duties.

Specifically, the Missouri statutes define "vital statistics" as "data derived from certificates and reports of birth [and] death" and provide that "[t]he [D]epartment [of Health and Senior Services] shall establish an office which shall install, maintain and operate the only system of vital statistics throughout the state. The office shall provide for the preservation of its official records." Mo. Rev. Stat. §§ 193.015(14) & 193.025.

The Missouri Sunshine Law defines a "public governmental body" as a "department or division of the state." Mo. Rev. Stat. § 610.010(4)(c). The Missouri **Department** of Health and Senior Services is, by definition, a "department" of the State of Missouri. *See* Mo. Rev. Stat. § 192.005 ("There is hereby created and established as a department of state government the 'Department of Health and Senior Services.'").

As such, there is no question that the requested birth and death listings are "public records" under the Sunshine Law. DHSS does not contend otherwise.

II. Does a statute "specifically prohibit" disclosure of the requested public records?

Under the Missouri Sunshine Law, public records are open to the public "except as otherwise provided by law." Mo. Rev. Stat. § 610.011.2. The "'except as otherwise provided by law' provision in [section 610.011.2] 'means except as otherwise provided by statute.'" *Pulitzer Pub. Co. v. Missouri State Employees' Ret. Sys.*, 927 S.W.2d 477, 481 (Mo. App. 1996); *see State ex rel. Goodman v. St. Louis Bd. of Police Comm'rs*, 181 S.W.3d 156, 159 (Mo. App. 2005) ("In other words, public records are open to the public unless a statute protects their disclosure.").

Further, Section 610.011 provides that "[i]t is the public policy of this state that … records … of public governmental bodies be open to the public" and that "exceptions [be] **strictly construed** to promote this public policy." Mo. Rev. Stat. § 610.011.1 (emphasis

added); *Scroggins v. Missouri Dep't of Soc. Servs.*, 227 S.W.3d 498, 500 (Mo. App. 2007) ("Statutory exceptions allowing records to be closed are to be strictly construed.").

Taken together, these two provisions mean that records are therefore open for inspection under the Sunshine Law unless another statute "**specifically prohibit**[**s**] public inspection" of them. *Oregon County R-IV School Dist. v. LeMon*, 739 S.W.2d 553, 557 (Mo. App. 1987) (emphasis added). To hold otherwise, explained the court, "would not be in keeping with the legislative intent" of the Sunshine Law, which "'speak[s] loudly and clearly … that the records of [a public governmental] body … must be open.'" *Id*. at 559-60 (quoting *Cohen v. Poelker*, 520 S.W.2d 50, 52 (Mo. banc 1975)).

In *LeMon*, the plaintiff, Bob LeMon, made a Missouri Sunshine Law request to the Oregon County School District for a list of students' names, addresses and telephone numbers. The school district brought an action for a declaratory judgment as to whether the records were closed records under the Sunshine Law because, among other reasons, they contained "personally identifiable information" protected by the federal Family Educational Rights and Privacy Act ("FERPA").

Specifically, the school district asserted that because FERPA prohibited educational institutions from disclosing "personally identifiable information" (which the parties agreed included the students' names, addresses and phone numbers) without parental consent, the records were closed records under the Sunshine Law. LeMon, however, pointed out that FERPA provided that "[a]n educational agency or institution **may disclose** personally identifiable information from the education records of a student [for] directory [purposes]." 34 CFR § 99.37 (1987) (emphasis added).

After the circuit court ruled the listings were open records under the Sunshine Law because FERPA did not close the listings, the school district appealed. The school district

argued that because FERPA provided that the school district "may disclose" information for use in a school directory, the district was not required to provide that information under the Sunshine Law. Specifically, the school district argued:

> Federal law … provides that a school district ***may*** release directory information to the public .... The federal regulations ... make clear that a school district ***may*** disclose directory information …. The federal law and the federal regulations do not ***require*** disclosure of directory information. There is no logic to the Circuit Court's rationale that because federal law permits disclosure, state law requires disclosure.

739 S.W.2d at 558-59 (emphasis in original).

The Court of Appeals rejected the school district's argument, writing: "There is no merit in that argument." *Id*. at 559. In explaining its ruling, the court first noted that under the Sunshine Law public records are open to the public, unless some law "specifically prohibit[s] public inspection" of the records. *Id*. at 557. Specifically, the court quoted the applicable provision of the Sunshine Law, which provided that "except as otherwise provided by law, … public records shall be open to the public for inspection and duplication." *Id*. at 555 (quoting Mo. Rev. Stat. § 610.015).

The court then examined FERPA and found that not only does it not specifically prohibit disclosure of directory information, "[t]he federal statute, and the regulations implementing it, permit disclosure of the requested information" for directory purposes. *Id*. at 559. Specifically, the court cited the applicable provision of the FERPA regulations, which provided that "[a]n educational agency or institution **may disclose** personally identifiable information from the education records of a student [for] directory [purposes]." 34 CFR § 99.37 (1987) (emphasis added).

Based on these two provisions, the court found that "the trial court properly required disclosure because of the general mandate of [the Sunshine Law] and because [FERPA] did not bar disclosure." *Id*.

III. Section 193.245 does not "specifically prohibit" disclosure of the listings

The only basis for which DHSS claims it could deny Ms. Ganz's requests for the requested birth and death listings is Section 193.245 of the Missouri Revised Statutes. The question before this Court, therefore, is whether Section 193.245 "specifically prohibits" the disclosure of birth and death listings.

Section 193.245 provides as follows:

> It shall be unlawful for any person to permit inspection of, or to disclose information contained in, vital records or to copy or issue a copy of all or part of any such record **except** as authorized by this law and by regulation or by order of a court of competent jurisdiction or **in the following situations**:
>
> (1) **A listing of persons who are born or who die on a particular date may be disclosed upon request**, but no information from the record other than the name and the date of such birth or death shall be disclosed;

Mo. Rev. Stat. § 193.245(1) (emphasis added).

As can be seen, Section 193.245(1) states on its face that "[a] listing of persons who are born or who die on a particular date **may be disclosed** upon request." As such, it is obvious from the plain meaning of the words used in the statute that it does not "specifically prohibit" disclosure of birth and death lists. *See Pulitzer Pub. Co. v. Missouri State Employees' Ret. Sys*., 927 S.W.2d 477, 482 (Mo. App. 1996) ("words used in the statute are to be considered in their plain and ordinary meaning").

This conclusion is well-supported by the Court of Appeal's decision in *LeMon*, where the court was faced with the identical question posed by DHSS in this case: does a

law which provides that the government "may disclose" certain public records "specifically prohibit" disclosure of those same records.

In *LeMon*, the applicable provision in FERPA provided as follows:

> "An educational agency or institution **may disclose** personally identifiable information from the education records of a student [for] directory [purposes]."

39 CFR § 99.37 (1987) (emphasis added).

And Section 193.245, which DHSS relies on, provides:

> "A listing of persons who are born or who die on a particular date **may be disclosed** upon request, but no information from the record other than the name and the date of such birth or death shall be disclosed."

Mo. Rev. Stat. § 193.245(1) (emphasis added).

In both cases, the law does not "specifically prohibit" disclosure of the information, but instead expressly provides that the government "may disclose" the requested information, under specified parameters or limitations (which are applicable here, *i.e.*, the requests seek only the name and date of each person who was born or who died in Missouri during the relevant time).

Even under DHSS' interpretation of Section 193.245(1), disclosure of birth and death listings are not "specifically prohibit[ed]" by the law—they are merely "discretion[ary]." Specifically, DHSS asserts in its denial letter that Section 193.245(1) gives it "discretion" to grant—or deny—a request for birth and death listings and that "the department has opted to **exercise the discretion granted in Section 193.245(1)**, RSMo, to decline these requests." (Def. Resp. to Pl. SOF ¶ 63) (emphasis added). Because DHSS concedes Section 193.245 gives it "discretion" to release the listing, it plainly does not "specifically prohibit" its disclosure.

Moreover, DHSS admits that many years before it denied Ms. Ganz's requests that it had "regularly" disclosed birth and death listings. Specifically, in the three years before Ms. Ganz made her requests, DHSS provided birth and death listings in response to between 50 to 100 different requests. (Def. Resp. to Pl. SOF ¶ 77).

As such, DHSS concedes that Section 193.245(1) does not "specifically prohibit" disclosure of the request listings. To find otherwise, *i.e.* that Section 193.245 specifically prohibits disclosure of the birth and death listings against the plain language of the statute, would effectively give "too much scope" to Section 193.245 and "insufficient scope" to Section 610.011, which requires that public records shall be open to the public for inspection and duplication unless their production is "specifically prohibited." *Oregon County R-IV School Dist. v. LeMon*, 739 S.W.2d 553, 556 (Mo. App. 1987).

Because disclosure of birth and death listings under Section 193.245 is not specifically prohibited, the Court finds the listings are not closed records under the Missouri Sunshine Law. Accordingly, the Court sustains Plaintiffs' motion for summary judgment as to Count II of Plaintiffs' Petition.[1]

IV. DHSS violated the Sunshine Law by charging excessive fees

The Court further finds that DHSS violated the Missouri Sunshine Law not just by denying Ms. Ganz's requests, but—before that—by demanding excessive and unlawful fees from Ms. Ganz to provide the requested public records. Those fees were improper for two reasons. First, DHSS' initial charge of $1.46 million was plainly excessive, as DHSS itself effectively admitted when it dropped its charge to $5,174.04. Second, because the

[1] Because Plaintiffs will receive the relief they need by the grant of summary judgment in their favor as to Count II, the Court dismisses Count I as moot. *See Antioch Cmty. Church v. Bd. of Zoning Adjustment of City of Kansas City*, 543 S.W.3d 28, 42 (Mo. banc 2018).

hourly rate which DHSS used in calculating its later charge was more than double the allowable hourly rate, the $5,174.04 charge was more than twice the allowable charge under the Sunshine Law.

A. DHSS' original charge of $1.49 million violated the Sunshine Law

DHSS does not dispute that its original charge of $1.49 million was excessive; nor could it, given that it later charged just over $5,000 to provide copies of the same listings. Instead, DHSS argues that its admittedly excessive charge did not violate the Sunshine Law because it was only an "estimate," and that Plaintiffs never actually paid that amount. The Court finds DHSS's argument unavailing.

Last year, the Circuit Court in Boone County ruled that where a governmental body demands an excessive charge to produce public records, it has violated the Sunshine Law. *See ARME d/b/a Beagle Freedom Project v. Curators of the University of Missouri*, No. 16BA-CV01710, Judgment (Cir. Ct. Boone County, Missouri, Nov. 8, 2019). In that case, the Beagle Freedom Project made a Sunshine Law request to the University of Missouri for records concerning the university's use of dogs and cats in research.

The university responded by providing a cost estimate of $82,222. The university demanded payment of this amount before it would produce the documents. Later, the university acknowledged that its original fee estimate was excessive, and provided a revised estimate of $8,950.

The court found the university was not relieved of liability merely because it called the $82,222 charge an "estimate." As the court explained, "[a]n estimate, as opposed to an exact number, does not relieve government from doing due diligence to confirm the basis of an estimate, particularly when government demands pre-payment before producing public records and particularly when the estimate approaches $100,000." *Id*. at 21. "While an

estimate is inherently inexact, there is nonetheless an obligation on the part of government to make a diligent effort to accurately calculate costs to avoid creating a roadblock to disclosure." *Id*. "When hours and costs are not adequately questioned, the result can effectively stymie a taxpayer from getting government records." (*Id*. at 21-22).

The court concluded that the excessive cost estimate violated the Sunshine Law, because "[t]he cost estimate in this case was tantamount to a denial of the request" in that it "for all practical purposes prevented Plaintiff from obtaining the public documents and frustrated the twin policies of openness and lowest cost embodied in the Open Records Act." *Id*. at 18, 26.

The Court finds this analysis persuasive. Moreover, if an "estimate [that] approaches $100,000" is an effective denial, an "estimate [that] approaches" $1.5 million is plainly a denial. No reasonable person could be expected to pay that amount.

Accordingly, the Court finds DHSS violated the Sunshine Law when it demanded that DHSS pay $1.49 million for the requested listings.

B. DHSS' later charge of $5,174.04 violated the Sunshine Law

The Missouri Sunshine Law provides that a governmental agency may charge for staff time to produce records maintained on computer facilities. Specifically, Section 610.026 provides as follows:

> Fees for providing access to public records maintained on computer facilities … shall include **only the cost of** copies, **staff time, which shall not exceed the average hourly rate of pay for staff of the public governmental body** required for making copies and programming, if necessary, and the cost of the disk, tape, or other medium used for the duplication.

Mo. Rev. Stat. § 610.026.1(2) (emphasis added).

There are two problems with DHSS' hourly rate calculation. First, DHSS used the wrong "average hourly rate of pay for staff." Specifically, in arriving at its $5,174.04

charge, DHSS used an hourly rate of $22.61, rather than the actual "average hourly rate" of $20.65 for a person in the Research Analyst III job classification.

This appears to be the result of a mathematical error, and not an intentional error. Moreover, while DHSS now concedes the hourly rate it used in its calculation was wrong, it was nevertheless within the approximate range of hourly rates DHSS uses when it provides estimates of the cost of responding to Sunshine Law requests. For example, in its initial response to Plaintiffs' requests, DHSS stated that it "may charge $21.38 per hour for research." And in a later response which DHSS sent on May 27, 2016, it quoted an hourly rate of $20.85.

Second, and much more significant, despite the clear language of the statute that DHSS can "only" charge "the hourly rate of pay for staff of the public governmental body," DHSS charged nearly double that amount. Specifically, DHSS' own calculations show that it improperly made several additions to the actual "the hourly rate of pay," as shown below:

Actual hourly rate	$22.61
Fringe benefits	$10.70
Indirect allocation	$6.96
Network charge	$0.93
Server charge	$0.58
Total	**$41.78**

(Def. Resp. to Pl. SOF ¶¶ 97-103). These charges are plainly improper.

"The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language." *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013) (citing *State v. Graham*, 204 S.W.3d 655, 656 (Mo. banc 2006)). Here, the terms of the statute are clear.

First, it says that the fees charged "shall include **only**" the charges listed. The term "only" has a clear meaning—it means DHSS cannot add charges that are not included in

the statute. *See R.L. Polk & Co. v. Missouri Dep't of Revenue*, 309 S.W.3d 881, 886 (Mo. App. 2010) ("Section 610.026.1(2) specifically limits the fee for providing access to public records maintained on computer facilities to include only the cost of copies, staff time, and the cost of the medium used for duplication.").

Second, the statute says DHSS may charge "staff time, which shall not exceed **the average hourly rate of pay** for staff of the public governmental body required for making copies and programming." Again, these terms have clear meanings. To begin with, the term "pay" means "something paid for a purpose and especially as a salary or wage."[2] In accord with that definition, the term "rate of pay" means "the amount of money workers are paid per hour, week, etc."[3] As such, the amount of money workers are paid is their hourly wage. In this case, that wage is reflected in DHSS' own workpapers as the "direct PS rate," where "PS" stands for "Pay Scale." (Def. Resp. to Pl. SOF ¶ 98).

The term "fringe benefit," on the other hand, has a completely different meaning. Specifically, a "fringe benefit" is "an employment benefit (such as a pension or a paid holiday) granted by an employer that has a monetary value but **does not affect basic wage rates**."[4] (Emphasis added). As such, fringe benefits are not included in a "rate of pay."

This construction of the term "rate" is supported by the Court of Appeals decision in *Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Missouri*, 912 S.W.2d 574 (Mo. App. 1995), where the court was faced with the question whether the term "salary rate" included fringe benefits. In finding that the term did not, the court explained, "[f]ringe benefits, such as health insurance, are '[s]ide, non-wage benefits which accompany or are in addition to

[2] https://www.merriam-webster.com/dictionary/pay.

[3] https://www.merriam-webster.com/dictionary/rate%20of%20pay.

[4] https://www.merriam-webster.com/dictionary/fringe%20benefit.

a person's employment such as paid insurance, recreational facilities, sick leave, profit-sharing plans, paid holidays and vacations, etc. Such benefits are in addition to regular salary or wages[.]'" *Id*. at 576 (quoting BLACK'S LAW DICTIONARY 667–68 (6th ed. 1990)). Accordingly, the court held "fringe benefits are not properly included in the term 'salary rate.'" *Id*.

The same is true here, *i.e*., fringe benefits are not properly included in the term "rate of pay."

Similarly, the "indirect allocation" which DHSS has added to the hourly rate, along with the "network charge" and "server charge" are not, under any meaning of the term "rate of pay," properly included.

Accordingly, the Court finds that DHSS violated the Sunshine Law when it charged Ms. Ganz $41.78 an hour, when the only allowable charge was the "average hourly rate of pay for staff of the public governmental body required for making copies and programming," which DHSS concedes is $20.65.

C. The allowable charges are $2,557.30

Based on this information, it is possible to calculate the cost of providing the two listings. Specifically, using a one-year search period, the number of hours needed to perform the resulting 96 searches for the birth listings (1920-2015) would have been 72 hours (96 searches x .75 hours per search). (Def. Resp. to Pl. SOF ¶ 112). Similarly, using the same one-year search period, the number of hours needed to perform the resulting 48 searches for the birth listings (1968-2015) would have been 51.84 hours (48 searches x 1.08 hours per search). (Def. Resp. to Pl. SOF ¶ 112).

Using these hours—and the actual "average hourly rate of pay for staff" of $20.65—the total cost of providing the birth listings would be $1,486.80 (72 hours x $20.65

an hour). (Def. Resp. to Pl. SOF ¶ 112). And the cost of providing the death listings would be $1,070.50 (51.85 hours x $20.65 an hour). (Def. Resp. to Pl. SOF ¶ 112).

Accordingly, the combined total for both listings would be $2,557.30, or less than half of DHSS' last estimate of $5,174.04—or roughly three-tenths of one percent of DHSS' original $1.49 million estimate.

The Court finds that summary judgment is therefore appropriate on Count III of Ms. Ganz's Petition.

V. DHSS Knowingly and Purposely Violated the Sunshine Law

A violation of the Sunshine Law does not itself require knowledge that a violation is occurring. *See Laut v. City of Arnold*, 491 S.W.3d 191, 199 (Mo. 2016). However, imposition of a penalty—and an award of attorney's fees to the prevailing party—does. *Id*.

Specifically, the Sunshine Law provides that a defendant who "knowingly" violates the law "shall" pay a civil penalty of up to $1,000, and "may" be ordered to pay the plaintiff's attorney's fees and costs. *See* Mo. Rev. Stat. § 610.027.3. It further provides that a defendant who "purposely" violates the law "shall" pay a fine of up to $5,000, and "shall" pay the plaintiff's attorney's fees and costs. *See* Mo. Rev. Stat. § 610.027.4. "What constitutes a knowing or purposeful violation of the Sunshine Law is a question of law." *ACLU of Missouri Found. v. Missouri Dep't of Corr*., 504 S.W.3d 150, 153 (Mo. App. 2016).

A. DHSS committed knowing violations of the Sunshine Law

"A knowing violation of the Sunshine Law occurs when a public governmental body has actual knowledge that its conduct violates a statutory provision." *Petruska v. City of Kinloch*, 559 S.W.3d 386, 389 (Mo. App. 2018) (citing *Laut v. City of Arnold*, 491 S.W.3d 191, 198 (Mo. banc 2016)).

Thus, the Court of Appeals regularly affirms findings of a knowing violation when the evidence showed the government withheld documents it knew were not exempt under the Sunshine Law—such as by belatedly producing the requested documents. *See, e.g., Am. Civil Liberties Union of Missouri Found. v. Missouri Dep't of Corr*., 504 S.W.3d 150, 156 (Mo. App. 2016) (DOC produced documents two days before trial); *Chasnoff v. Mokwa*, 466 S.W.3d 571, 584 (Mo. App. 2015) (police department produced documents in related litigation).

1. DHSS committed knowing violations regarding the hourly rate

Here, the Court finds the uncontradicted evidence establishes that at the time DHSS quoted Plaintiffs an hourly rate of $41.78 it knew that rate was more than double the actual allowable hourly rate of $20.65. This conclusion is compelled by the fact that in its initial response to Plaintiffs' requests, DHSS stated that it "may charge $21.38 per hour for research." (Def. Resp. to Pl. SOF ¶ 19). And in a later response which DHSS sent on May 27, 2016, it quoted a similar rate, writing: "The department's currently hourly rate for staff time is $20.85 per hour." (Def. Resp. to Pl. SOF ¶ 83).

Despite this clear evidence of its knowledge of the allowable hourly rate, DHSS used a rate of $41.78 an hour—more than double the allowable rate of $20.65 an hour (and double the hourly rates of $21.38 and $20.65 which DHSS quoted in its prior responses to Plaintiff).

Accordingly, the Court finds that DHSS knowingly violated the Sunshine Law when it knowingly charged Plaintiffs an hourly rate that was more than double the rate which DHSS knew was allowable under the Sunshine Law.

2. Knowing violations regarding denial of Plaintiffs' Sunshine Law requests

The Court also finds that DHSS committed a knowing violation of the Sunshine Law when—six months after it received Plaintiffs' requests, and after it had provided three separate fee estimates for producing responsive records—DHSS denied Plaintiffs' requests for open records.

To begin with, there is no question that DHSS knew that Ms. Ganz's requests fell within the Sunshine Law. This conclusion is obvious from numerous actions DHSS—through its Office of General Counsel—took in response to Ms. Ganz's request. First, Nikki Loethen, DHSS' General Counsel, reviewed the two requests and directed Emily Hollis (also in the DHSS Office of General Counsel) to "do the 3-day response" for each request. It is obvious that Ms. Loethen's reference to "the 3-day response" is to the Sunshine Law, which provides as follows: "Each request for access to a public record shall be acted upon as soon as possible, but in no event later than the end of the third business day following the date the request is received by the custodian of records of a public governmental body." Mo. Rev. Stat. § 610.023.3.

Second, Ms. Hollis responded to Plaintiffs within the three-day-period set forth in the Sunshine Law. Third, Ms. Loethen told Ms. Ganz that "[t]he department will charge for staff time … as authorized by Chapter 610" which, of course, is the Missouri Sunshine Law. (Def. Resp. to Pl. SOF ¶ 39). Fourth, when Ms. Hollis provided the cost estimate for providing the requested records, she expressly stated that the estimate had been prepared "[p]ursuant to your request and Section 610.026, RSMo"—the cost section of the Missouri Sunshine Law. (Def. Resp. to Pl. SOF ¶ 44).

Despite this knowledge, when Ms. Loethen issued her letter denying Ms. Ganz's request she made no mention of the Sunshine Law—and, therefore, made no effort whatsoever to claim any legitimate exemption under the Sunshine Law. Instead, she cited Section 193.245 as the basis of her denial. But the timing of the denial—coming nearly six months after the requests were made, and after three separate cost estimates—is evidence of a knowing violation.

Perhaps the most apposite case in this regard is *Am. Civil Liberties Union of Missouri Found. v. Missouri Dep't of Corr*., 504 S.W.3d 150 (Mo. App. 2016). There, the ACLU made a Sunshine Law request for documents concerning persons who had applied to be execution witnesses. After the Department of Corrections produced heavily-redacted documents, the ACLU asked the Department to explain its authority for the redactions. In response, the Department's Deputy General Counsel cited Section 610.035 as authority for redacting social security numbers, and Section 610.021(14) as authority for the remaining redactions.

The ACLU sued, arguing Section 610.021(14) only protects "[r]ecords which are protected from disclosure by law," and DOC had failed to cite any "law" closing the information. In response to the lawsuit, DOC asserted that it redacted the information pursuant to a "'penumbral' right [to privacy]." *Id*. at 153. The trial court, however, rejected this argument, noting that established precedent had held that that the term "by law" only means "by statute," and not some ill-defined right of privacy. *Id*.

> The trial court also noted that the Department's "right to privacy" redaction explanation appeared to the trial court to be nothing more than "an afterthought," and consequently, the trial court placed no credibility in the Department's attempt to belatedly and purportedly rely upon this basis for redacting information—information that the trial court noted was "[t]he type of information ... released by the Department of Revenue Driver's License

> Bureau on a daily basis and is available online from Casenet to the general public.

Id. Based on this finding, the trial court ruled that DOC had knowingly violated the Sunshine Law, and assessed a penalty against DOC, and awarded ACLU its attorney's fees. *Id*.

On appeal, the Court of Appeals affirmed the trial court's judgment, finding that substantial evidence existed to conclude that DOC's Deputy General Counsel knew that the Sunshine Law did not contain an exception for a "right of privacy," and agreed with the trial court that DOC's assertion of such a right of privacy "was nothing more than an 'afterthought'" used to justify DOC's decision to withhold the information. *Id*. at 156.

The Court finds DHSS' assertion that the requested birth and death listings are closed by Section 193.245 to be a similar "afterthought" which is being used to justify a decision which DHSS does not itself believe. This conclusion is supported by a host of facts, beginning with DHSS' failure to cite Section 193.245 until more than six months after it first responded to Plaintiffs' Sunshine Law requests.

Not only that, but DHSS provided not one, not two, but three separate cost estimates to Plaintiffs for fulfilling Plaintiffs' requests before reversing course and inexplicably denying Plaintiffs' requests. Moreover, these costs requests came not from some uninformed "underling" in the Department—instead, they came from the "Office of General Counsel" and, in many cases, they came personally from the Department's General Counsel, Ms. Loethen.

As such, just like the Department of Corrections (whose Deputy General Counsel was responding to the request in the *ACLU* case), DHSS had its top lawyer responding to Plaintiffs' requests—and repeatedly stating that the Department was working to fulfill

those requests. As such, the Court has no trouble finding that DHSS knew the requested records were not exempt under the Sunshine Law and its belated assertion that the requested listings are closed because of Section 193.245 is nothing but an "afterthought."

B. DHSS committed purposeful violations of the Sunshine Law

"A purposeful violation of the Sunshine Law occurs when there is 'a conscious design, intent, or plan to violate the law and do so with awareness of the probable consequences."' *Strake v. Robinwood W. Cmty. Improvement Dist*., 473 S.W.3d 642, 645 (Mo. banc 2015) (quoting *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. banc 1998); *see Wyrick v. Henry*, 592 S.W.3d 47 (Mo. App. 2019) (affirming finding of purposeful violation).

The Supreme Court's decision in *Strake* is instructive. There, the Robinwood Improvement District knew that a settlement agreement was a public record, but withheld it because the agreement contained an express confidentiality clause. Because the evidence showed that the district intentionally withheld the agreement—not because it was a closed record, but for the ulterior reason of avoiding liability under the agreement's confidentiality clause—the Supreme Court found the district committed a purposeful violation.

"Robinwood's decision to withhold the requested documents ... to avoid potential contractual liability amounts to 'purposely' violating the Sunshine Law as part of a 'conscious design, intent, or plan' to violate the law ... 'with awareness of the probable consequences.'" *Id*. at 199-200; *see also Laut v. City of Arnold*, 491 S.W.3d 191, 200 (Mo. banc 2016) (describing *Strake*'s holding as follows: "A purposeful violation involves proof of intent to defy the law or achieve further some purpose by violating the law, such as Robinwood's plan to avoid liability for breach of contract.").

Here, the evidence that DHSS purposefully violated the Sunshine Law in denying Plaintiffs' requests for the ulterior purpose of making Plaintiffs sue DHSS while the Department sought to change Missouri law to close the requested birth and death listings is both overwhelming and, most significantly, unrebutted. As such, summary judgment is appropriate. *See Malin v. Cole Cty. Prosecuting Attorney*, 565 S.W.3d 748 (Mo. App. 2019) (affirming grant of summary judgment finding defendant purposefully violated the Sunshine Law).

The secret plan advocated by Mr. Land, the former State Registrar—which DHSS followed meticulously—is a textbook case of a purposeful violation of the Sunshine Law. Mr. Land's plan provided as follows:

> I would not honor the request. I would require them to take you to court and then bring in national geneological [sic] and vital records experts to testify why making indexes is not good public policy. By delaying this you might file a regulation or get the Legislature to clarify the intent of the law.

(Def. Resp. to Pl. SOF ¶ 61).

As can be seen, the secret plan is in two parts. First: "I would not honor the request [and] would require them to take you to court." As the Court of Appeals has said, this is the paradigm of a purposeful violation of the Sunshine Law. "Chapter 610 would be a hollow law if it permitted a custodian intentionally to forestall production of public records until the requester sued." *Buckner v. Burnett*, 908 S.W.2d 908, 911 (Mo. App. 1995). Accordingly, "[a] public official's intentionally forestalling production of public records until the requester sues would be a purposeful violation of Chapter 610 and would be subject to a fine and reasonable attorney fees." *Id*.

The second part of the plan is equally devious: "By delaying this you might … get the Legislature to clarify the intent of the law." In fact, DHSS took Mr. Land's plan a step

further—it used the delay caused by the lawsuit to attempt to get the Missouri Legislature to amend Missouri law to **permanently** close birth and death listings.

This secret plan represents an utter disdain for "the public policy of this state that … records … of public governmental bodies be open to the public unless otherwise provided by law." Mo. Rev. Stat. § 610.011.1. Governmental bodies are not allowed to deny requests and **then** seek a law closing them; instead, they may only close records that are closed by existing law.

It is also important to consider the chronology of events—specifically, the fact DHSS' denial came only **after** Ms. Ganz's counsel had debunked the original $1.49 million demands for fees, which was clearly intended to be a back-door denial of Ms. Ganz's requests. And when DHSS refigured its cost estimate using information supplied by Ms. Ganz's counsel, it arrived at an estimate of approximately $5,000—still significantly higher than the allowable charges, but in a range that Ms. Ganz might consider paying.

Faced with this reality, DHSS had to scramble to find a way to prevent the disclosure. It found that way when Mr. Land provided a literal roadmap to achieve DHSS' illicit goal: deny the request, make Ms. Ganz sue, and then use the delay caused by the resulting lawsuit to go to the Missouri Legislature and try to get them to change the law to close otherwise open records. It is hard to imagine a more purposeful plot.

Finally, Ms. Loethen was unquestionably put on notice of the fact DHSS was violating the Sunshine Law when she received an 11-page letter from Ms. Ganz's counsel detailing why DHSS' sudden denial—nearly six months after it received Ms. Ganz's requests—was a violation of the Sunshine Law. Unable to rebut that charge, Ms. Loethen simply ignored the letter, causing Ms. Ganz to have to sue—which we now know was DHSS' secret plan after all.

Most significantly, DHSS makes no effort in its response to Plaintiffs' motion for summary judgment to rebut this evidence. Specifically, it admits the truth of each factual allegation regarding this plan, and its suggestions in opposition to Plaintiffs' motion make no mention whatsoever of the issue of DHSS' knowing and purposeful violations of the Sunshine Law.

Accordingly, the Court finds that DHSS committed both knowing and purposeful violations of the Sunshine Law and therefore grants Plaintiffs' motion for summary judgment as to Count IV of Plaintiffs' Petition.

C. An award of penalties for DHSS' knowing violations is warranted

The Sunshine Law provides that upon a showing the defendant committed a knowing violation, the defendant "shall be subject to a civil penalty in an amount up to one thousand dollars." Mo. Rev. Stat. § 610.027.3. The statute provides that in assessing the exact amount of the penalty, the court should "tak[e] into account the size of the jurisdiction, the seriousness of the offense, and whether the public governmental body" has previously violated the Sunshine Law. *Id.*

The Court believes that in this case the most significant of these factors is "the size of the jurisdiction," which can best be described as large, given the fact DHSS has an annual budget of $1.4 billion. *See* https://health.mo.gov/about/pdf/dhss-overview.pdf. Accordingly, the Court has no hesitancy in assessing a penalty of $1,000 for each of DHSS' knowing violations of the Sunshine Law.

In *Malin v. Cole Cty. Prosecuting Attorney*, 565 S.W.3d 748 (Mo. App. 2019), the Court of Appeals recently held that "[t]he plain language of the statute connects the penalty of up to five thousand dollars to the finding of a single purposeful violation of the Sunshine

Law." *Id*. at 754 n. 3. Thus, where the defendant committed multiple purposeful violations, the trial court was entitled to award up to $5,000 for **each** such violation. *Id*.

Given that the "plain language" of Sunshine Law's provisions regarding knowing and purposeful violations are identical as to an award of penalties, this Court believes that *Malin* authorizes the award of up to a $1,000 penalty for each knowing violation of the Sunshine Law.

Accordingly, the Court assesses a $1,000 penalty against DHSS for its knowing violation of the Sunshine Law as to the excessive charges it levied in response to Plaintiffs' request for birth listings, and a separate $1,000 penalty against DHSS for its knowing violation of the Sunshine Law as to the excessive charges it levied in response to Plaintiffs' separate request for death listings.

The Court chooses not to assess a penalty against DHSS for its knowing violation of the Sunshine Law for knowingly denying Plaintiffs' requests because, as set forth below, it assess penalties against DHSS for its purposeful violations of the Sunshine Law in this regard.

D. An award of penalties for DHSS' purposeful violations is warranted

The Sunshine Law provides that upon a showing the defendant committed a purposeful violation, the defendant "shall be subject to a civil penalty in an amount up to five thousand dollars." Mo. Rev. Stat. § 610.027.4. The statute provides the same guidance as to the factors to be considered in assessing the exact amount of the penalty as with a knowing violation. *Id*.

As to DHSS' purposeful violations in improperly denying Plaintiffs' requests, along with the size of the jurisdiction, the Court believes the most significant factor is the seriousness of the offense. DHSS' scheme to purposefully violate the Sunshine Law was

blatant and, with the benefit of DHSS' internal documents, obvious. The very "purpose of the conduct[] was to violate the law." *Laut v. City of Arnold*, 491 S.W.3d 191, 199 (Mo. banc 2016).

As such, a serious penalty is required to deter others from committing similar acts. "[T]he remedies of civil fines … were added to beef up and to deter violation[s]" of the Sunshine Law. *Kansas City Star Co. v. Shields*, 771 S.W.2d 101, 104 (Mo. App. 1989) (citing *Cohen v. Poelker*, 520 S.W.2d 50, 52–53 (Mo. banc 1975)). Additionally, as noted above, given DHSS' $1.4 billion annual budget, a penalty of $5,000 is far from excessive.

Accordingly, the Court assesses a $5,000 penalty for DHSS' purposeful violation of the Sunshine Law for improperly denying Plaintiffs' request for birth records, and a separate $5,000 penalty for DHSS' purposeful violation of the Sunshine Law for improperly denying Plaintiffs' request for death records.

E. An award of Plaintiffs' attorney's fees is warranted

The Sunshine Law further provides that upon a showing of a knowing violation, the Court "may" order the defendant to pay the plaintiff's attorneys fees and costs. Mo. Rev. Stat. § 610.027.3. It further provides that upon a showing of a purposeful violation, the Court "shall" order the defendant to pay the plaintiff's attorneys fees and costs. Mo. Rev. Stat. § 610.027.4.

Here, the Court has found that DHSS committed both knowing and purposeful violations of the Sunshine Law. Accordingly, under either provision, the Court orders DHSS to pay Plaintiffs' attorneys fees and costs.

The Court believes that such an award is both required under subdivision (4), and appropriate under subsection (3). Specifically, as noted above, the disparity between a $5,000 penalty and DHSS' annual budget of $1.4 billion is obvious. As such, an imposition

of even the maximum penalty—which this Court has done—does little to foster the purpose of Section 610.027, *i.e.*, to punish DHSS for its wrongdoing and to deter others from committing similar acts. See *Kansas City Star Co. v. Shields*, 771 S.W.2d 101, 104 (Mo. App. 1989).

In this Court's original Memorandum and Judgment, the Court directed the parties to meet and confer in an attempt to agree upon a reasonable attorney's fee. I further provided that if the parties were unable to agree on such a fee, Plaintiffs were to file a formal motion requesting their fees and costs.

After the parties were unable to agree on a reasonable fee, Plaintiffs filed their motion to amend the Court's prior judgment to set the amount of Plaintiffs' attorney's fees and costs. The Court takes up that motion in the following section.

VI. Plaintiffs' reasonable attorney's fees and costs

Consideration of the reasonableness of an attorney's fee award includes numerous factors, including (1) the rates customarily charged by the attorneys involved, and by other attorneys in the community for similar services; (2) the number of hours reasonably expended on the litigation; (3) the nature and character of services rendered; (4) the degree of professional ability required; (5) the nature and importance of the subject matter; (6) the amount involved or the result obtained; and (7) the vigor of the opposition. *Berry v. Volkswagen Group of America, Inc.*, 397 S.W.3d 425, 431 (Mo. banc 2013).

The Court will consider each of these factors below.

A. Plaintiffs' attorneys' hourly rates are reasonable

Plaintiffs submitted the affidavit of their lead counsel, Bernard J. Rhodes, in support of their request for attorney's fees and costs. In his affidavit, Mr. Rhodes, a partner at Lathrop GPM's Kansas City office, stated that Plaintiffs were charged for the work of two

attorneys: himself and Taryn A. Nash, an associate. Mr. Rhodes further stated that over the course of the litigation, Plaintiffs were charged (and paid) an average hourly rate of $585 for his time, and an average hourly rate of $272 for Ms. Nash's time. Mr. Rhodes further stated that these rates were the firm's standard hourly rates for both himself and Ms. Nash during the relevant years, and that other clients regularly paid these rates.

Additionally, these hourly rates are comparable—and in fact lower—than the hourly rates the Missouri Court of Appeals for the Western District recently approved in another Missouri Sunshine Law case. Specifically, in *Wyrick v. Henry*, 592 S.W.3d 47 (Mo. App. 2019), the court of appeals approved rates of $600 an hour for a partner at a Kansas City firm, and $350 an hour for an associate at the same firm. *Id*. at 65.

In its opposition to Plaintiffs' request, DHSS does not dispute that these hourly rates may be appropriate for Kansas City. It argues, however, that Kansas City rates should not apply here, because this case was brought in Cole County and, consequently, the relevant legal "community" is mid-Missouri, and not Kansas City.

The Eighth Circuit Court of Appeals has considered—and rejected—this precise argument. In *McDonald v. Armontrout*, 860 F.2d 1456 (8th Cir. 1988), the Court of Appeals addressed whether—for purposes of determining a reasonable attorney's fee for a case litigated in Jefferson City—the relevant legal "community" is limited to Jefferson City, or includes the entire state of Missouri.

> We are not at all convinced that central Missouri is the relevant "community" under *Blum*. *Blum* does not define "community" and **the argument for an expansive reading of "community" is particularly strong in a case such as this, since Jefferson City is the capitol of the state and lawyers from throughout the state have business there**."

Id. at 1460 n.6 (emphasis added). In line with this reasoning, the court used St. Louis hourly rates to determine the reasonable hourly rate of the prevailing plaintiff's attorney. *Id*.

Here, Plaintiffs were required to file their suit in Cole County because DHSS' principal place of business is in Jefferson City, the State Capital. *See* Mo. Rev. Stat. 610.027.1. Accordingly, the Court agrees with the Eighth Circuit Court of Appeals that the relevant community is not limited to Jefferson City, but includes Kansas City.

Accordingly, the Court finds that the rates for which Plaintiff's seek recovery are the rates customarily charged by the attorneys involved, and by other attorneys in the community for similar services.

B. The number of hours Plaintiffs' attorneys expended are reasonable

Plaintiffs' original fee application set forth detailed time entries for 281.6 hours. The Court has reviewed these entries and, being familiar with this litigation, finds the number of hours to be reasonable. The number of hours spent reflects the time and expertise necessary for Counsel to challenge a seven-figure cost estimate, investigate and understand the relevant technology (and thereby allow counsel to provide guidance on how to conduct more efficient searches), respond to DHSS' sudden reversal and ultimate denial of Plaintiffs' Sunshine Law requests, develop legal theories, prepare pleadings, conduct both written discovery and depositions, and eventually seek summary judgment.

As the trial court noted in *Wyrick*, "this matter was anything but a standard, run-of-the-mill, records request, and consumed more than a year of litigation before final resolution." *Wyrick v. Henry*, Judgment/Order, No. 1716-CV24321, at 1-2 (Jackson Cnty., Mo. Cir. Ct. Feb. 7, 2019).

Except here, the litigation has consumed nearly four years—not one year. And at least some of that delay resulted from the revolving door of attorneys for DHSS. As recited in Mr. Rhodes' affidavit—and as unrebutted by Defendant—DHSS was represented in this

lawsuit by at least seven different attorneys. That fact necessarily increased the number of hours required to prosecute Plaintiff's claims.

Moreover, the Court has compared the number of hours expended by Plaintiffs here to the number of hours expended by the plaintiff's counsel in another recent successful Sunshine Law case. In *ARME v. The Curators of the University of Missouri*, Case No. 16BA-CV01710 (Boone Cnty., Mo. Cir. Ct. Nov. 8, 2019), the university was found to have purposefully violated the Sunshine Law by demanding unreasonable fees to produce the requested records, and was ordered to pay the plaintiff's attorney's fees. Plaintiff's counsel submitted a fee application which included the time of three lawyers, who spent a total of 404.9 hours through summary judgment. This is 100+ hours more than the 281.6 hours which Plaintiffs are requesting.[5]

The number of hours Plaintiffs' counsel spent on the matter here are thus consistent with the number of hours spent by other lawyers on a similar matter.

In addition, in his affidavit, Mr. Rhodes explained that the number of hours Plaintiffs submitted reflected several reductions from the actual hours expended on the matter. These included, for example, a reduction of 17.4 hours as a result of the meet and confer process, and an additional 43.9 hours of work billed to Plaintiffs, but which counsel believed should not be charged to DHSS. This included, for example, time spent on legal theories which were not ultimately asserts in this litigation. The Court thus finds that Plaintiffs' counsel exercised proper billing judgment. *See Stallsworth v. Staff Mgmt. | SMX, LLC*, No. 2:17-CV-04178-NKL, 2018 WL 2125952, at *2 (W.D. Mo. May 8, 2018).

[5] The parties in the *ARME* case recently resolved the issue of plaintiff's attorney's fees in that case. Under the parties' settlement agreement, the university paid ARME $175,000 in full satisfaction of ARME's claims for attorney's fees and the $1,000 civil penalty assessed against the school.

Finally, Plaintiffs' counsel submitted an additional 9.3 hours for preparation of the formal fee application. This time is compensable. *See DeWalt v. Davidson Surface Air*, 449 S.W.3d 401, 406 (Mo. App. 2014) (allowing recovery of time spent preparing fee application). The Court finds these 9.2 hours to be reasonable.

Accordingly, the Court finds that the total amount of hours submitted by Plaintiff's counsel, *i.e.*, 281.6 hours + 9.3 hours = 290.9 hours, were reasonably expended on this lawsuit.

C. The remaining factors

As noted above, this was not a run-of-the-mill Sunshine Law case. Instead, it posed unique challenges, which Plaintiffs' counsel were able to skillfully overcome. Because of those efforts, Plaintiffs' counsel obtained a complete victory for their client, including an award of civil penalties and recovery of their attorneys' fees. As the Missouri Supreme Court has explained, in determining the reasonableness of request for attorney's fees, an "important consideration is the results achieved." *O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64, 71 (Mo. banc 1989).

Moreover, the litigation was very important to Plaintiffs. As its name suggests, the very purpose of Reclaim the Records is to "reclaim" public "records" which government agencies wrongfully claim are their own, and to return those documents to the public. As such, Plaintiffs' lawsuit went to the very heart of the non-profit organization's purpose. This fact makes the result obtained even more result significant.

All of this brings to mind U.S. District Judge Nanette Laughrey's recent statement: "By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have,

had he been more of a slacker." *M.B. v. Tidball*, No. 2:17-CV-4102-NKL, 2020 WL 1666159, at *14 (W.D. Mo. Apr. 3, 2020).

D. Fee and cost award

Accordingly, the Court finds that Plaintiffs are entitled to an award of reasonable attorney's fees in the amount of $136,182.00 and an additional $1,473.02 in costs,[6] for a total of $137,655.02.

VII. DHSS' motion for leave to file a supplement response is denied

After briefing on Plaintiffs' motion for summary judgment was completed, DHSS filed a motion for leave to file supplemental summary judgment papers. Specifically, DHSS sought leave to file "a supplement to its Response to Plaintiffs' Motion for Summary Judgment." (Def. Mot. for Leave at 1). In support of its request, DHSS stated that its response to Plaintiffs' summary judgment motion "does not accurately or fully represent DHSS' public policy concerns" with release of the requested birth and death listings. (Def. Mot. for Leave at 2). DHSS noted that "[t]his issue … has not been directly addressed by either party." (Def. Mot. for Leave at 2).

The only reason DHSS gave for this failure to "accurately or fully represent DHSS' public policy concerns" was to suggest that the Assistant Attorney General previously assigned to the case had failed to do so. Specifically, the motion states as follows: "At the time this issue was discovered, cases involving Sunshine Law litigation were transferred to a different section of the Attorney General's Office. As a result, this case was recently assigned to the undersigned counsel." (Def. Mot. for Leave at 3).

[6] DHSS does not challenge Plaintiffs' application for costs.

On November 15, 2019—without having ever noticed up for hearing its motion for leave—DHSS lodged with the Court "Defendant's Proposed Supplemental Response to Plaintiff's Motion for Summary Judgment." It included a Statement of Facts with 26 new facts which had never previously been submitted to the Court. In addition, DHSS attached 16 separate exhibits to its proposed filing.

A. Summary judgment procedure

Rule 74.04 provides that a party opposing a motion for summary judgment "shall serve a response on all parties." Mo. Sup. Ct. R. 744.04(c)(2). The rule further provides that "[t]he response shall set forth each statement of fact in its original paragraph number and immediately thereunder admit or deny each of movant's factual statements." *Id*. Finally, it provides that "[t]he response may also set forth additional material facts that remain in dispute, which shall be presented in consecutively numbered paragraphs and supported in the manner prescribed by Rule 74.04(c)(1)." *Id*.

Rule 74.04(c)(5) states succinctly: "No other papers with respect to the motion for summary judgment shall be filed without leave of court." The rationale behind this rule is simple: "Otherwise, a summary judgment proceeding could become a blizzard of paper, as it almost did here." *New Prime, Inc. v. Prof'l Logistics Mgmt. Co*., 28 S.W.3d 898, 904 (Mo. App. 2000).

While courts may permit replies, oral argument, or even post-hearing memorandum, it is an entirely different inquiry when a party "wishes to … enlarge the record after the motion and response have been filed." *Cross v. Drury Inns, Inc*., 32 S.W.3d 632, 636 (Mo. App. 2000) "No case has sanctioned the filing of materials raising new factual issues, grounds, or arguments." *Id.*

That, however, is exactly what DHSS wanted to do, *i.e.*, it wanted to submit additional evidence and affidavits relating to "DHSS's policy considerations" to respond to Plaintiffs' otherwise fully-briefed summary judgment motion. Importantly, DHSS acknowledges that these "additional material facts, supporting documents, and … explanation" relate to an issue that was "not directly addressed by either party" in the actual summary judgment briefing. (Def. Mot. for Leave at 2 &4).

The Court finds that DHSS' motion seeks to enlarge the record to introduce an entirely new issue and new facts into the summary judgment that was not briefed by either party. As a result, it is improper and would, as the Court of Appeals stated in its *New Prime* decision, risk turning the summary judgment proceeding into "a blizzard of paper." *New Prime, Inc. v. Prof'l Logistics Mgmt. Co.*, 28 S.W.3d 898, 904 (Mo. App. 2000).

B. Rule 44.01 does not support DHSS' request

In its motion, DHSS cites Rule 44.01(b) but never explains how that rule supports its request. That rule provides that once a deadline expires, a party may seek an extension of the deadline only upon a showing of "excusable neglect." Mo. Sup. Ct. R. 44.01(b). "Excusable negligent" is defined as the failure to act "not because of the party's own carelessness [or] inattention, … but because of some unexpected or unavoidable hindrance or accident." *Inman v. St. Paul Fire & Marine Ins. Co.*, 347 S.W.3d 569, 576 (Mo. App. 2011); *Flowers v. City of Campbell*, 384 S.W.3d 305, 314 (Mo. App. 2012).

Here, not only does Rule 44.01(b) not apply because DHSS is not asking for an "extension" of time to respond, the only effort DHSS makes to show neglect is to assert that "[a]t the time this issue was discovered," the case was assigned to a new assistant attorney general. (Def. Mot. for Leave at 3). But repeated decisions of the Court of Appeals have held that the mere failure of counsel to act in a timely manner does not qualify as

"excusable neglect. *See, e.g.*, *Irvin v. Palmer*, 580 S.W.3d 15, 23 (Mo. App. 2019); *Flowers v. City of Campbell*, 384 S.W.3d 305, 314 (Mo. App. 2012); *Inman v. St. Paul Fire & Marine Ins. Co.*, 347 S.W.3d 569, 577 (Mo. App. 2011); *Allison v. Tyson*, 123 S.W.3d 196, 205 (Mo. App. 2003).

Accordingly, the Court finds that DHSS has not shown "excusable neglect."

C. DHSS' "public policy concerns" are futile

Notwithstanding the procedural defects with DHSS' request for leave, the Court has reviewed DHSS' proposed filing and finds that it is legally ineffectual because DHSS' arguments regarding "public policy concerns" are futile.

Just last year, the Missouri Supreme Court reaffirmed the principle that public policy is the domain of the Legislature, not the courts. "This Court will not second-guess how the legislature struck the delicate balance between the competing interests of privacy and transparency. This Court's obligation is to apply the … sunshine law as written, not as the election board may believe it could be better written." *Roland v. St. Louis City Bd. of Election Commissioners*, 590 S.W.3d 315, 321 (Mo. banc 2019).

This rule of law is not new. "This Court, however, is not a policy-making body." *Scroggins v. Missouri Dep't of Soc. Servs.*, 227 S.W.3d 498, 503 (Mo. App. 2007). "[I]ssues of policy must be addressed to the state legislature, and we are tasked only to give effect to the statute as written by the legislature." *Laut*, 417 S.W.3d at 325. "'There is no room for construction even when a court may prefer a policy different from that enunciated by the legislature.'" *Spradlin v. City of Fulton*, 982 S.W.2d 255, 261 (Mo. 1998).

Accordingly, whether Section 193.245 should prohibit disclosure is irrelevant, for "[s]tatutory amendment is the prerogative of the Legislature." *N. Kansas City Hosp. Bd. of Trustees v. St. Luke's Northland Hosp.*, 984 S.W.2d 113, 122 (Mo. App. 1998). And in this

case, DHSS admits that it tried to do just that, *i.e.*, to amend Section 193.245 to prohibit disclosure of birth and death listings, and failed. DHSS cannot obtain from this Court what it failed to obtain from the Legislature; instead, this Court must give effect to the statute as written.

Accordingly, even if the Court were to consider DHSS' proposed supplemental filing, the Court would find that its effort to introduce the concept of "public policy" would be futile.

For all these reasons, DHSS' motion for leave to file additional summary judgment papers is denied.

VIII. DHSS' motion for summary judgment is denied

After DHSS lodged its proposed supplemental response in opposition to Plaintiffs' motion for summary judgment, it filed its own motion for summary judgment. In it, DHSS argued that "Section 213.245 … authorizes, but does not require, DHSS to provide" birth and death listings upon request. (Def. Summ. Judgment Mot. at 2). Presumably, DHSS meant to cite to Section 193.245, for there is no Section 213. 245.

In any event, this Court has already found that because Section 193.245 does not "specifically prohibit" disclosure of the requested birth and death listings, it cannot serve as a basis for closing the listings. Accordingly, DHSS' motion for summary judgment is denied for the same reasons Plaintiffs' motion for summary judgment is granted.

Additionally, the Court has reviewed the statement of facts which DHSS submitted with its motion and finds that those facts are largely duplicative of the statement of facts submitted by Plaintiffs. And where DHSS has submitted new facts, those facts support the

Court's finding that DHSS knowingly and purposefully violated the Sunshine Law by denying Plaintiffs' request for birth and death listings.[7]

For example, DHSS Fact No. 8 states that DHSS' initial response to Plaintiffs' requests "was a standard response to a request for records under the Sunshine Law." That is exactly what Plaintiffs have alleged, as it shows that DHSS knew that Plaintiffs' requests were made under the Sunshine Law.

Similarly, DHSS Fact Nos. 11-18 relate to conversations Ms. Ganz had with Dr. Louis Wambuguh, who at the time was Interim Chief and a Research Manager in the Bureau of Vital Statistics. (DHSS Fact No. 11). In that position, Dr. Wambuguh's "duties include managing vital statistics, including oversight of the [sic] protecting confidentiality of vital records." (DHSS Fact No. 12). According to DHSS' own facts, during one such conversation, "Dr. Wambuguh told Ms. Ganz that DHSS was able to provide names and the date of birth or date." (DHSS Fact No. 14). "Dr. Wambuguh concluded the call by stating that someone would be getting back to Ms. Ganz with a cost estimate." (DHSS Fact No. 17).

Again, these facts support Plaintiffs' allegation that DHSS repeatedly stated it would produce the requested birth and death listings, and that the only delay was in calculating the cost of producing the listings.

As such, none of DHSS' facts change this Court's conclusion that DHSS knowingly and purposefully violated the Sunshine Law when it improperly denied Plaintiff's requests for birth and death listings.

[7] Interestingly, the statement of facts which DHSS attached to its separate motion for summary judgment did not include any of the facts DHSS included with its proposed supplemental response to Plaintiffs' motion for summary judgment.

Judgment

WHEREFORE, it is hereby ordered, adjudged and decreed as follows:

1. The Motion of Plaintiffs Brooke Schreier Ganz, both individually and as an authorized representative of Reclaim the Records, a non-profit, unincorporated association, for Summary Judgment as to Counts II, III and IV is Granted;

2. Defendant Department of Health and Senior Services is ordered to provide Plaintiff Brooke Schreier Ganz with (a) digital listings of all persons who were born in the State of Missouri between 1920 and 2015 (which shall include the name of each person and the date of their birth) and (b) digital listings of all persons who died in the State of Missouri between 1968 and 2015 (which shall include the name of each person and the date of their death), within 15 days following the receipt of payment from Plaintiff of the total cost of $2, 557.30;

3. Because Plaintiffs have received the relief they requested in Count I by the grant of summary judgment in their favor as to Count II, Count I of Plaintiffs' Petition is dismissed as moot;

4. Defendant Missouri Department of Health and Senior Services is ordered to pay Plaintiff Brooke Schreier Ganz a penalty of $1,000 for its knowing violation of the Sunshine Law as to the excessive charges it levied in response to Plaintiffs' request for birth listings;

5. Defendant Missouri Department of Health and Senior Services is ordered to pay Plaintiff Brooke Schreier Ganz a penalty of $1,000 for its knowing violation of the Sunshine Law as to the excessive charges it levied in response to Plaintiffs' separate request for death listings;

6. Defendant Missouri Department of Health and Senior Services is ordered to pay Plaintiff Brooke Schreier Ganz a penalty a $5,000 for its purposeful violation of the Missouri Sunshine Law when it denied Plaintiffs' request for birth listings;

7. Defendant Missouri Department of Health and Senior Services is ordered to pay Plaintiff Brooke Schreier Ganz a penalty a $5,000 for its purposeful violation of the Missouri Sunshine Law when it denied Plaintiffs' request for death listings;

8. Defendant Missouri Department of Health and Senior Services is ordered to pay Plaintiff Brooke Schreier Ganz her costs and reasonable attorney's fees in establishing DHSS' violations of the Sunshine Law in the amount of $136,182.00 in attorney's fees and $1,473.02 in costs, for a total of $137,655.02;

9. The Motion of Defendant Missouri Department of Health and Senior Services for leave to file a supplement response to Plaintiff's Motion for Summary Judgment is Denied; and

10. The Motion of Defendant Missouri Department of Health and Senior Services for Summary Judgment is Denied.

July 9, 2020
Date

The Honorable Patricia S. Joyce