MISSOURI CIRCUIT COURT
TWENTY-SECOND CIRCUIT
(CITY OF ST. LOUIS)

AMERICAN CIVIL LIBERTIES UNION OF MISSOURI FOUNDATION, ET AL.,	)	
PLAINTIFF,	)	
V.	)	NO. 1622-CC09801
	)	DIV. 18
METROPOLITAN POLICE DEPT. OF CITY OF ST. LOUIS,	)	
DEFENDANT.	)	

MEMORANDUM, ORDER AND JUDGMENT

This action proceeds under §§ 610.010 et seq., known as the Sunshine Law, and was tried to the Court. The following constitutes the Court's findings of fact and conclusions of law.

The facts of this are relatively simple. On June 3, 2016, Plaintiff ACLU filed a request under the Sunshine Law with the records custodian of Defendant Metropolitan Police Department of the City of St. Louis.[1] The request asked for all arrest reports from the City of St. Louis between June 1, 2016 and June 2, 2016. On June 8, the Department timely responded to the ACLU's request, notifying plaintiff that the records requested were available in two different formats, at

[1] Plaintiff insists on suing the Police Department, apparently relying on the broad language of §610.021.2, which refers to "departments' of government agencies or entities. Given that the Police Department is now in fact and law a department of the City of St. Louis, the Court suggests that the City should be the proper party defendant, but because the City Counselor has appeared for the defendant, and has not raised an issue regarding capacity of the party defendant, the Court will proceed on the assumption that it has the necessary personal jurisdiction in this case.

plaintiff's option, reflecting 138 arrests during the specified time period.

The first option (hereinafter Option #1) consisted of copies of police reports, to be provided at an aggregate cost of $1377.00. This total cost breaks down to $894 for the reports themselves at the Department's standard fee of $6.50 per report, plus $480 in staff time for searching, retrieving, and redacting the sensitive information from the reports. Option #2 carried a total cost of $11.00 and it would consist of an Excel spreadsheet generated by the Department's IT department along with a letter explaining all of the column headings; this report would have most of the information that would be included in Option #1, minus the narrative of the report (which will be discussed shortly).

After receiving the Department's letter on June 8 that included both options, the ACLU filed this suit alleging that the $6.50 fee per report is in violation of the Sunshine Law for various reasons. First, under *R.L. Polk & Co. v. Mo. Dep't of Revenue*, 309 S.W.3d 881, 886 (Mo. App. W.D. 2010), the ACLU claims that any flat fee is invalid. Second, the Sunshine Law defines an "arrest record" in §610.100.2 and later in the same general section provides that the arrest report must be an open record; the ACLU contends that the record must either be kept in conformity with the statutory definition, or, if the Department opts to put extra information onto the report they must provide the entire record with no redactions. Third, if the Department does decide to redact portions of the report, the Sunshine Law

provides what can be charged to the requester and it is limited to the cost of copies, staff time, and cost of the medium used to generate the report; the Sunshine Law does not allow for redaction time to be charged or the time taken to search and retrieve the record as "staff time" refers only to the time actually dealing with copying and providing the report requested. Finally, the ACLU contends that the Department knew of the definitions and provisions of the Sunshine Law ahead of providing the letter and, therefore, the violations of the Sunshine Law herein mentioned were done knowingly and purposefully.

The Department argues that there was no violation, and if there was it was not done knowingly and purposefully. First, the Department argues that the Sunshine Law defines an "arrest report" but that does not mandate a record to be kept in a certain way. The Sunshine Law's provisions require that the reports be made available to the requester, something which could have been achieved through either of the two options in the redacted incident reports or the IT-developed spreadsheet. Second, the Department relies upon previous litigation in this Court in *Davis v. Crossman*, Cause No. 1022-CC10551 in which Judge Moriarty ruled that the $6.50 average fee for providing accident reports was reasonably calculated and was not in violation of the Sunshine Law. The Department distinguishes *Polk* arguing that the issue there was that the calculations were flawed and rudimentary in that it included things which were not chargeable under the Sunshine Law; here, the calculations were based on staff time which is allowed under the law and the average length of the reports that need to be

redacted. Finally, the Department argues that even if the Court finds the fee or options provided to be in violation of the Sunshine Law, the violations were not done knowingly and purposefully, because the previous litigation in this Court allow for a good-faith basis that their conduct was not in violation of the law.

The Missouri Open Records or Sunshine Law provides the following pertinent definitions, § 610.100.1, RSMo 2000 & Supp.:

> (2) "Arrest report", a record of a law enforcement agency of an arrest and of any detention or confinement incident thereto together with the charge therefor;
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> * * *
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> (4) "Incident report", a record of a law enforcement agency consisting of the date, time, specific location, name of the victim and immediate facts and circumstances surrounding the initial report of a crime or incident, including any logs of reported crimes, accidents and complaints maintained by that agency;
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> (5) "Investigative report", a record, other than an arrest or incident report, prepared by personnel of a law enforcement agency, inquiring into a crime or suspected crime, either in response to an incident report or in response to evidence developed by law enforcement officers in the course of their duties;
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> * * *

The statute further provides, § 610.100.2 (emphasis added):

> 2. (1) Each law enforcement agency of this state, of any county, and of any municipality shall maintain records of all incidents reported to the agency, investigations and arrests made by such law enforcement agency. **All incident reports and arrest reports shall be open records.**
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> * * *
>
> (3) If any person is arrested and not charged with an offense against the law within thirty days of the person's arrest, the arrest report shall thereafter be a closed record except that the disposition portion of the record may be accessed and except as provided in section 610.120.

The dispute in this case stems from the record-keeping practices of the Department and the failure of the Sunshine Law to mandate *how* records shall be kept, as distinct from what information in such records must be open. In other words, the Sunshine Law tells government what it must disclose, but does not tell government to keep the records showing such information in the form most convenient to disclosure. At trial, plaintiff submitted a sample arrest report from the Belton Police Department, as an example of an arrest report that complies with the statutory definition. Defendant objected, essentially on the ground of relevance, arguing that the Belton arrest report exemplar is not indicative of what the St. Louis Metropolitan Police Department does regarding its record-keeping practices. This is absolutely correct, but the differences between the form of the Belton arrest report and the form of reports offered to plaintiff by defendant highlight the fact that Department has chosen not to tailor its recordkeeping so as to facilitate compliance with the Sunshine Law.

At the Court's request, the defendant supplied exemplars of the records proffered to plaintiff in response to its request, including reports which would be provided for the $6.50 fee. The exemplars furnished by defendant show that, as a matter of fact, the defendant Department simply does not keep "arrest report" records in a form contemplated by the definition set forth in § 610.100.1(2). Instead, the Department generates "incident reports," which include crime report information plus information about arrests, if any, in response

to such reports. These "incident reports" are in fact what the criminal practice refers to as "police reports," and contain all the information contemplated by the "arrest report" definition in the Sunshine Law, plus information concerning victims, witnesses, and damaged or stolen property, and a narrative written by a police officer so as to memorialize the circumstances of the incident to which the police responded. Defendant simply does not keep its arrest information in the form of "arrest reports" as defined in the Sunshine Law. Hence, the proffer of the spreadsheet information.[2]

The "incident reports" or police reports offered by defendant for flat fee of $6.50 apiece include all the information that an arrest report would include (assuming that there was an arrest in response to the reported incident) plus much more, including the narrative written by the police officers as to what happened. From the testimony at trial, the Court finds that these incident reports vary significantly in length, running from a few pages to 100 pages, depending on the nature of the investigation that resulted from the report of an incident.

In the *Davis* case, mentioned above, Judge Moriarty was dealing with the question of whether $6.50 was an unreasonable fee under the Sunshine Law when a request was made for incident reports or accident

[2] The explanatory letter filed with the spreadsheet exemplar outlines a variety of categories of information, including charge codes, which would provide all the information embraced within the statutory definition of arrest report, but the spreadsheet exemplar filed with the Court appears to omit charge codes and other information mentioned in the explanatory letter. If the spreadsheet exemplar conformed to the explanatory letter, the Court finds that it would conform to the statutory definition of "arrest report" and this action would be moot.

reports. The testimony showed that the fee was arrived at after calculating the average cost of redacting the sensitive information from the incident reports given their varied length, with the understanding that for short records the fee would be "expensive" but for the 100-page reports the fee would be very "cheap." Judge Moriarty ruled that given the varying nature of the reports and the time it takes to redact the sensitive information, the $6.50 fee was not unreasonable and was not in violation of the Sunshine Law.

In this instance though, the request was made for "arrest reports," which have a specific definition under the statute. The question becomes whether charging $6.50 is reasonable given the record-keeping practices of the Department, and the answer is no.

The Sunshine Law states that "all incident reports and arrest reports shall be open records." §610.100.2(1). This means that the records must be made available to citizens upon filing a valid request under the Sunshine Law, such as the ACLU's request for the arrest reports during the period of June 1-2, 2016. The Department's response was that they do not keep an "arrest report" under the statute's definition per se and that their only means of providing the information requested is to take the "incident report" and redact it down. The Court can only speculate that the Department's rationale for this form of record-keeping is in the name of expediency so that they do not have to generate both an "arrest report" and an "incident report," when the latter contains all of the information the former is mandated to contain. The problem comes when the Department attempts to

make citizens who request open records information pay a premium for those records, because the Department chooses to maintain records in its own way.

The Sunshine Law does not mandate that a record be kept in a certain manner, but it does mandate that open records be made available upon request, defines what those records are, and specifies what can and cannot be charged to the citizen for providing open records. The fee authorization provided by statute, though, are directly related to the records defined in the statute. In other words, when you are providing an "arrest report" you can charge for the cost of copying, the staff time for the copying, and the medium of the copying, and the same is true for an "incident report" plus the additional staff time for redacting the incident report's sensitive information. The Sunshine Law's fee requirements, therefore, are fixed with reference to open records as defined by the Sunshine Law. The record in this case demonstrates, though, that the Department does not maintain records in a format that coincides with definitions in the Sunshine Law. The Department's record-keeping practices thus require extra expense to produce "arrest report" information as defined in the Sunshine Law. The Department's flat $6.50 fee is essentially shifting the cost of generating the "arrest report" on to the citizen. In light of other records kept by the Department that substantially provide all the information an "arrest report" would contain, the Department's insistence on providing redacted "incident reports" in lieu of

statutorily defined "arrest reports" at $6.50 apiece is unreasonable and is in violation of the Sunshine Law.

This Court had before it recently the case of *Farber v. Metropolitan Police Department*, Cause No. 1622-cc05285. Because the records at issue in *Farber* are interrelated with the records at issue here, in the interests of justice the Court can take judicial notice of the Department records in evidence in *Farber*. See W. Schroeder, 33 *Missouri Practice: Courtroom Handbook on Missouri Evidence* §201.2. In that case, Mr. Farber filed a citizen's complaint against certain police officers involved in his arrest. One of the documents submitted into the record was the Department's Internal Affair's Division file.[3] There are two records in that file which are generated by the Department on a regular basis and included in police reports that would provide substantially all of the information the ACLU requested in this case.

The first is the Field Booking Form[4], a 2-page document filled out by the police when a person is arrested. It provides the name of the arrestee along with some other demographic information, the date of the offense, and the charges the arrest was made for. The second is the Prisoner Processing Copy[5]. This is a 3-page document generated upon

[3] This Court ruled that large portions of that file are considered open records under the Sunshine law, including all the portions referenced in this Order.

[4] Pg. 98-99 of the IAD File admitted into evidence in *Farber*.

[5] Pg. 95-97 of the IAD File.

confining the arrestee and contains the name and demographic information of the arrestee, the charges preferred, along with the date of the offense. Both of these records are routinely generated by the Department and would require minimal staff-time to copy and redact the sensitive information such as fingerprints and social security numbers. Both of these records also contain substantially the same information as the arrest report from the Belton Police Department which was put into evidence in this case as an exemplar of an arrest report conforming to the Sunshine Law's statutory definition.

In light of the fact that documents exist which closely parallel the Sunshine Law's definition of "arrest report," the Department cannot claim, in response to a Sunshine Law request for arrest reports, that the only means to provide the information requested is to redact that often-lengthy "incident report." The Department could just as easily pull either the Field Booking Form or the Prisoner Processing Copy, redact the few lines of information on a document that has a length of about 3 pages, and charge significantly less than $6.50 for the production of the report.

In sum, the Department cannot force plaintiff to pay for something that it does not want in order to get what the Sunshine Law mandates. The "incident report" for which defendant seeks to charge $6.50 is not an "arrest report." Plaintiff is entitled to an arrest report at reasonable cost, and the functional equivalent can be provided by the Department with at minimal cost.

Plaintiff seeks attorney's fees and expenses in the event of success, asserting that defendant has violated the Sunshine Law knowingly and purposefully. The Court, however, finds that defendant has not knowingly or purposefully violated the Sunshine Law. The issue of the flat fee for incident reports was decided in the defendant's favor in this Court. The Department was not attempting to keep closed a record that is supposed to be open; rather, the Department was attempting to charge an unnecessarily high fee for producing records, because the Department chose not to keep records in a manner conforming to Sunshine Law desiderata. Because the Sunshine Law does not mandate that records be kept in a particular manner, the Court cannot find that the Department's practice in this case was a knowing or purposeful violation of the Sunshine Law. See *Laut v. City of Arnold,* 491 S.W.3d 191 (Mo.banc 2016); *White v. City of Ladue,* 422 S.W.3d 439 (Mo.App.E.D. 2013).

ORDER AND JUDGMENT

For the foregoing reasons, it is

ORDERED, ADJUDGED AND DECREED that plaintiff have judgment against defendant and that it is declared that the fees charged for providing arrest reports for the period of June 1 to June 2, 2016, are unreasonable and excessive, and defendant is permanently enjoined and restrained from providing arrest reports as defined in §610.100.1(2) at a cost of $6.50 apiece, and is further permanently enjoined and restrained from providing arrest reports at a cost to the requesting party in excess of ten cents per page plus staff time to produce

redacted booking forms or their equivalent; attorney's fees denied; costs taxed against defendant.

SO ORDERED:

ROBERT H. DIERKER
CIRCUIT JUDGE

DATED: May 17, 2017
CC: COUNSEL/PARTIES PRO SE