

MISSOURI CIRCUIT COURT
NINETEENTH JUDICIAL CIRCUIT
COLE COUNTY

American Civil Liberties Union of Eastern)	
Missouri Fund, et al.,)	
)	
Plaintiffs,)	
)	Cause No: 12AC-CC00692
v.)	
)	Division: 1
Missouri Department of Corrections,)	
)	
Defendant.)	

**PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

I. Additional Material Facts.

Plaintiffs submit the following additional Material Facts in Support of their motion for partial summary judgment:

1. Pursuant to Mo. R. Civ. P. 57.03(b)(4), Plaintiffs served a notice of deposition scheduled for April 26, 2013, for which Defendant was to designate a person or persons to testify on its behalf regarding five topics. Plaintiffs' Exhibit S (notice of Rule 57.03(b)(4) deposition) – attached hereto.

2. Defendant designated David Dormire, Director of the Division of Adult Institutions for the Missouri Department of Corrections, to testify on its behalf regarding all five topics at the deposition on April 26, 2013, and he did. Plaintiffs' Exhibit F at 8, 19, 37-38, 42-43, 50-51, 86.

3. Plaintiffs' Sunshine Law request asked for "a letter listing the specific exemptions upon which [it] rel[ied] for each denial" of records. Plaintiffs' Ex. B.

II. Argument.

A. Summary Judgment Standard.

The parties agree that Defendant is a “public governmental body” subject to the Sunshine Law and that the records at issue are “public records.” As a result, the burden of persuasion has shifted to Defendant. § 610.027.2, RSMo. To defeat Plaintiffs’ motion for partial summary judgment Defendant must demonstrate compliance with the Sunshine Law. *Id.* Defendant cannot meet its burden.

B. Dormire’s testimony is material and binding on Defendant.

Plaintiffs’ motion is supported by the deposition testimony of Defendant’s designee David Dormire, Director of the Division of Adult Institutions for the Missouri Department of Corrections. Defendant responds that “Dormire’s testimony is immaterial” because, in Defendant’s view, Dormire was not adequately prepared. *Defendant’s Response* at 5. Defendant designated Dormire to testify on its behalf. *See supra* § I at ¶¶ 1-2. The testimony of a designated representative “will be admissible against and binding on the corporate party.” *State ex rel. Reif v. Jamison*, 271 S.W.3d 549, 551 (Mo. banc 2008). This is the case even if a party later claims that its designee was wrong or was not competent to testify. *See e.g., Ashford Condo., Inc. v. Horner & Shifrin, Inc.*, 328 S.W.3d 714, 720 (Mo. App. E.D. 2010) (finding testimony of one of a party’s designees binding despite the party’s contention that the designee’s “recollection was simply erroneous.”).

Trial courts do not judge the credibility of witnesses for the purpose of ruling on a motion for summary judgment. *Pub. Sch. Ret. Sys. of Missouri v. Taveau*, 316 S.W.3d 338, 345 (Mo. App. W.D. 2010). At this stage, Defendant must cite “to the discovery,

exhibits, or affidavits that demonstrate there is a genuine issue for trial” despite Dormire’s testimony. *See* Mo. R. Civ. P. 74.04. As in *Ashford Condo.*, Defendant points to no evidence “to suggest that [its designee’s] recollection was inaccurate in any respect.” 328 S.W.3d at 720. Defendant criticizes Dormire’s testimony as “general.” Even assuming that characterization were accurate, Dormire’s testimony is nonetheless relevant and probative. *See Gen. Mills Operations, LLC v. Five Star Custom Foods, Ltd.*, 703 F.3d 1104, 1110 (8th Cir. 2013) (rejecting party’s claim that its designee was not competent to testify about specifics about which he lacked personal knowledge and finding designee “certainly is competent to testify ... as to [the party’s] understanding ... – that that is the precise function of the corporate designee.”).

Dormire testified that Department concerns regarding the release of any information that might be exempt from production could be addressed by redaction. *Plaintiffs’ SUMF* at ¶¶ 27, 29, and 32. This testimony comports with the Sunshine Law, which mandates redaction. § 610.024.1, RSMo (“If a public record contains material which is not exempt from disclosure as well as material which is exempt from disclosure, the public governmental body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.”). In response, Defendant cites to the general conclusion of Scott Weber, Grievance Unit Manager, who testified that “anything on any of these forms is confidential.” *Defendant’s Ex. E* at 53. But Defendant is nonetheless bound by Dormire’s testimony because it designated him to testify on its behalf.

Defendant also denies that “DOC’s designee admits that none of the records requested by the Plaintiffs are subject to the personnel records exception.” But Defendant’s designee did testify that none of the records requested by Plaintiffs are subject to the personnel records exception. *Plaintiffs’ SUMF* at ¶ 28 (citing Plaintiffs’ Exhibit F at 39-41). Indeed, Defendant admits that the fourteen records do not contain “individually identifiable personnel records” or “performance ratings,” but claims that all the records “pertain” to employees. Whether a bare assertion that records “pertain” to employees is sufficient to permit the records to be closed under the Sunshine Law is a question of law, not a dispute of material fact.

Defendant denies that “DOC’s designee admits that there is no factual basis to exempt Documents 1-4 pursuant to [the institutional security exemption].” But Defendant’s designee did testify that there is no factual basis to exempt Documents 1-4 pursuant to the institutional security exemption. *Plaintiffs’ SUMF* at ¶ 26 (citing Plaintiffs’ Ex. F at 27). Defendant is bound by that testimony. In any event, both Dormire and Weber testified that Qandah should have received the Documents 1, 2, 3, and 4 (as would any inmate who participates in the IRR and Grievance processes). Plaintiffs’ Ex. F at 74-75; Defendant’s Ex. E at 22-23. Both Dormire and Weber also testified that there are no limits as to what inmates can do with those four documents. Plaintiffs’ Ex. F at 76; Defendant’s Ex. E at 75, 83, 85. Because those four documents originate with and are returned to the inmates, the Department takes great pains to not include anything in them that reveal confidential institutional security information, legal advice, or personnel records. *See* Defendant’s Ex. E at 157 (citing a department regulation that states that

copies of investigative materials, such as internal affairs, investigative reports, staff statements, staff reports and employee personnel information will not be given to the offender); Plaintiffs' Ex. F at 45 (legal opinions not provided to inmates). It is not plausible for Defendant to maintain, contrary to Dormire's testimony (Plaintiffs' Ex. F at 26-27, 38, 39-41, 44-45), that institutional security is threatened by releasing these same documents pursuant to a Sunshine Law request. It is not possible that Defendant gives inmates records that so threaten institutional security that they are exempt from the Sunshine Law.

Even if this Court finds that Weber's testimony on this point presents a genuine issue for trial, it does not preclude this Court from granting partial summary judgment to Plaintiffs and ordering that these four documents, like the other ten documents, be produced in a redacted form pending the trial on the merits.

C. Insufficient Basis for Denial.

Defendant partially denies paragraphs ¶¶ 17, 23, 24, and 31, but fails to "support [these partial] denials with specific reference to the discovery exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial." Mo. R. Civ. P. 74.04(c)(2). As such these four paragraphs are admitted. *Id.* See also, e.g., *Goff v. Fowler*, 323 S.W.3d 797, 802 (Mo. App. W.D. 2010) (finding that Rule 74.04(c)(2) "required that the [plaintiff's] response to [defendant's] motion 'support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.'").

D. Waiver.

Defendant is correct that no Missouri court appears to have addressed waiver of defenses in the Sunshine Law context. This is likely because Defendant's attempt to claim one exception when it denies a citizen's request for records and then claim additional exceptions after being sued is not supported by any reading of chapter 610, nor does it comport with the public policy of the state.

The Sunshine Law specifies that:

If a request for access is denied, the custodian shall provide, upon request, a written statement of the grounds for such denial. Such statement shall cite the specific provision of law under which access is denied and shall be furnished to the requester no later than the end of the third business day following the date that the request for the statement is received.

§ 610.023.4, RSMo (emphasis added). Plaintiffs requested "a letter listing the specific exemptions upon which you rely for each denial." *See supra* § I at ¶ 3. Defendant offers no evidence to dispute that, in response to Plaintiffs' Sunshine Law request, it cited only to 28 C.F.R. § 40.10 as the basis for refusing to disclose any responsive records.

Plaintiffs' SUMF at ¶ 18. This is consistent with Defendant's policy that offender grievance records are "closed" only pursuant to 28 C.F.R. § 40.10. *Plaintiffs' Response to Defendant's Motion for Summary Judgment*, filed October 25, 2013, at § II, ¶ 2 (citing Defendant's Ex. B at § II.C.7).

"Chapter 610 embodies Missouri's commitment to open government and is to be construed liberally in favor of open government." *State ex rel. Missouri Local Gov't Ret. Sys. v. Bill*, 935 S.W.2d 659, 664 (Mo. App. W.D. 1996). "The provisions of the

Sunshine Law are to be liberally construed to promote this public policy.” *Stewart v. Williams Commc’ns, Inc.*, 85 S.W.3d 29, 32 (Mo. App. W.D. 2002). While the federal Freedom of Information Act and other states’ laws might be premised on the same philosophy favoring open government, such laws and court decisions “do not determine our legislative public policy nor do they control our judicial decisions.” *Hyde v. City of Columbia*, 637 S.W.2d 251, 262 (Mo. App. W.D. 1982). The legislature has mandated that if a custodian denies access to public records, then the custodian must, upon request, specify the legal basis for doing so. Permitting Defendant to come up with additional reasons after litigation has commenced, as it attempts here, renders superfluous the statutory requirement of notice of the reasons for denial. *See Civil Serv. Comm’n of City of St. Louis v. Members of Bd. of Aldermen of City of St. Louis*, 92 S.W.3d 785, 788 (Mo. banc 2003) (presuming that “the legislature did not insert idle verbiage or superfluous language in a statute.”).

This Court should find that Defendant waived all but the claimed exception pursuant to 28 C.F.R. § 40.10.

III. Conclusion.

This Court should enter partial summary judgment in favor of Plaintiffs, finding, as matter of law, that: (1) Defendant is a “public governmental body” subject to the Sunshine Law, (2) the records requested are “public records,” and (3) Defendant cannot prove its alleged affirmative defenses that the records are exempt from the Sunshine Law pursuant to §§ 217.075.1, 610.021(1), 610.021 (13), or 610.021(14), RSMo. Further, this

Court should order Defendant to disclose to Plaintiffs copies of Documents 1-4 and redacted copies of all other responsive records.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'ATROTHERT', is written over a horizontal line.

ANTHONY E. TROTHERT, #44827

GRANT R. DOTY, #60788

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Missouri Department of Corrections,)	
)	
Defendant.)	

NOTICE OF RULE 57.03 (B)(4) DEPOSITION

To: You-Jin J. Han, #63858
Assistant Attorney General
Supreme Court Building
207 West High Street
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Attorney for Defendant

PLEASE TAKE NOTICE that, pursuant to Rule 57.03 (b)(4) of the Missouri Rules of Civil Procedure, the deposition of Missouri Department of Corrections (MODOC), the Defendant in this action, through one or more officers, directors, or managing agents, or other persons who consent to testify under oath and on its behalf in the above-styled cause on **April 26, 2013 at 8:00 a.m.** at Offices of the Attorney General; Broadway State Office Building; 221 West High Street; 6th Floor Small Conference Room; Jefferson City, MO 65101, before a court reporter.



This examination is requested with respect to the following matters:

1. The factual basis for MODOC's contention that the records requested by the Plaintiffs are exempted from production under Missouri's Sunshine Law pursuant to Mo. Rev. Stat. § 217.075.1(2), because of 28 C.F.R. § 40.10.
2. The factual basis for MODOC's contention that the records requested by the Plaintiffs are exempted from production under Missouri's Sunshine Law pursuant to Mo. Rev. Stat. § 217.075.1(3), because they are "internal administrative report [s] or document[s] related to institutional security."
3. The factual basis for MODOC's contention that the records requested by the Plaintiffs are exempted from production under Missouri's Sunshine Law pursuant to Mo. Rev. Stat. § 610.021(13) because they are "[i]ndividually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment..."
4. The factual basis for MODOC's contention that the records requested by the Plaintiffs are exempted from production under Missouri's Sunshine Law pursuant to Mo. Rev. Stat. § 610.021(1) because they, *inter alia*, "relate to... legal actions, causes of action or litigation involving a public governmental body and any confidential or privileged communications between a public governmental body or its representatives and its attorneys."

5. Identification of the blank forms on which the records requested by the Plaintiff are transcribed.

Said deposition is to be continued from day to day at the same place and time until completed.

Respectfully,

A large, stylized handwritten signature in black ink, appearing to read 'A. Rothert'.

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Certificate of Service

The undersigned certifies that on April 18, 2013, I emailed and mailed a copy of
Plaintiff's Notice of Rule 57.03 (b)(4) Deposition to:

You-Jin J. Han
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Respectfully,



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Attorneys for the Plaintiff

Certificate of Service

I certify that on November 7, 2013, I mailed, pursuant to Mo. R. Civ. P. 74.04(c)(2), the Plaintiffs' Reply in Support of their Motion for Partial Summary Judgment along with an electronic copy of the Reply in MS Word format on a CD-ROM to:

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