

MISSOURI CIRCUIT COURT
NINETEENTH JUDICIAL CIRCUIT
COLE COUNTY

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

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. Introduction.

Allaeddin Qandah, while incarcerated at Northeast Correctional Center, submitted to the Department of Corrections ("DOC") an Informal Resolution Request ("IRR") alleging that a DOC employee intentionally damaged his Quran during a cell search. *Statement of Uncontroverted Material Fact* ("SUMF"), at ¶ 6. Qandah later appealed DOC's response to his IRR by submitting an Offender Grievance. *Id.* at ¶¶ 7-8.

After receiving a complaint from Qandah, Michael Hill, on behalf of the American Civil Liberties Union of Eastern Missouri ("ACLU"), wrote DOC in March 2012, pursuant to the Sunshine Law, requesting "copies of any and all records relating to [Qandah's] 'IRR # NECC 11321 – property damage.'" *Id.* at ¶¶ 10, 12-13. According to

Defendant, there are fourteen public records responsive to this request.¹

¹ Records responsive to Plaintiffs' Sunshine Law request include the following fourteen documents:

- a. "Document 1" is a completed DOC Informal Resolution Request ("IRR") form, dated March 2, 2011 (blank form - *SUMF*, **Ex. H**), with an attached, handwritten, two-page document in which Qandah further details his complaint;
- b. "Document 2" is a completed IRR Response from DOC employees, addressed and provided to Qandah, dated April 4, 2011 (blank form - *SUMF*, **Ex. I**);
- c. "Document 3" is a completed DOC Offender Grievance form (blank form - *SUMF*, **Ex. J**), and an attached, handwritten, two-page document in which Qandah further details his Complaint, dated April 7, 2011 ("Qandah's Grievance");
- d. "Document 4" is the warden's written response to Qandah's Grievance from Chantay Godert, Deputy Warden of Offender Management, as appearing on the Warden's Response form, dated May 2, 2011 (blank form - *SUMF*, **Ex. K**);
- e. "Document 5" is Qandah's Personal Property List itemizing his personal property, its location, identifying number, and staff comments, dated April 4, 2011 (redacted version - *SUMF*, **Ex. L**); Document 5 concerns Investigation 1 (IRR);
- f. "Document 6" is an Institutional Search Report detailing cell searches conducted by DOC employees, including of Qandah's cell, on or about the date relevant to Qandah's Complaint, dated March 2011 (blank form - *SUMF*, **Ex. M**); Document 6 concerns Investigation 1 (IRR);
- g. "Document 7" is a memorandum exchanged between DOC employees pertaining to the investigation of Qandah's IRR (Investigation 1), as appearing on Inter-office Communication Form, Form number MO 931-9003, dated March 13, 2011 (blank form - *SUMF*, **Ex. N**);
- h. "Document 8" is a memorandum exchanged between DOC employees seeking information in the investigation of Qandah's Grievance (Investigation 2), as appearing on Northeast Correctional Center, Grievance Response Request form, dated April 28, 2011 (blank form - *SUMF*, **Ex. O**);
- i. "Documents 9" is a memorandum exchanged between DOC employees pertaining to the investigation of Qandah's Grievance (Investigation 2), dated May 1, 2011 (no "form" version exists for this document); and
- j. "Document 10" through "Document 14" are memoranda exchanged between DOC employees pertaining to the investigation of Qandah's IRR (Investigation 1), various dates (no "form" version exists for these documents).

SUMF at ¶¶ 15, 22-24.

On or about May 17, 2012, Heather McCreery, Legal Counsel for DOC, replied in writing to Hill denying the request for the records. *SUMF* at ¶ 16. In a separate pre-litigation letter to Plaintiffs' counsel, McCreery asserted that DOC was "authorized" to close the records requested, and "chose[] to do so." *Id.* at ¶ 17. In both of these letters, DOC cited to § 610.021 (14), which exempts from production "[r]ecords which are protected from disclosure by law," and then identified 28 C.F.R. § 40.10 as the sole basis for claiming this exception. *Id.* at ¶ 18. None of the 14 documents responsive to the Plaintiffs' request were disclosed in response to the Sunshine request. *Id.* at ¶¶ 15, 19, 22.

Despite only citing § 610.021(14) RSMo and 28 C.F.R. § 40.10 in its denial of the Plaintiffs' Sunshine Law request,² DOC modified its position in its First Amended Answer and now claims three additional reasons for closing the records. *SUMF* at ¶ 21. Plaintiffs have conducted sufficient discovery to fully dispose of three of Defendant's four affirmative defenses. Furthermore, four of the fourteen documents are not subject to the remaining claimed exception and can be disclosed without redaction and the remaining ten documents can be disclosed after redaction of any information that this Court finds might be exempt from disclosure until this Court can hold a trial on the merits.

² Plaintiffs maintain that DOC waived its right to claim additional exceptions after responding to Plaintiffs' Sunshine request.

II. Argument.

A. Summary Judgment Standard.

A motion for summary judgment must be granted when, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993). The moving party need not establish issues by unassailable proof. *Martin v. City of Washington*, 848 S.W.2d 487, 492 (Mo. banc 1993). Where a fact is established on a summary judgment motion, the burden falls to the non-moving party to establish that an issue of controversy remains. *Id.*

In evaluating Plaintiffs' claim under the Sunshine Law, this Court must consider whether (1) Defendant is a "public governmental body"; (2) the records at issue are "public"; and (3) any statutory exceptions apply. *See News-Press & Gazette Co. v. Cathcart*, 974 S.W.2d 576 (Mo. App. W.D. 1998).

B. Defendant is "public governmental body" subject to Missouri's Sunshine Law.

Whether Defendant is "public governmental body" is a threshold issue. *See, e.g., Stewart v. Williams Commc'ns, Inc.*, 85 S.W.3d 29, 32 (Mo. App. W.D. 2002) (holding that provisions of the Sunshine Law apply only to the records of public governmental bodies). The Sunshine Law defines "public governmental body" to include any "administrative or governmental entity created by the constitution or statutes of this state" as well as "[a]ny department or division of the state." § 610.010(4), RSMo. There is no

factual dispute that Defendant is a government entity created by the statutes of the State of Missouri and is subject to the Sunshine Law. *SUMF* at ¶ 14.

C. The records requested are public records under the Sunshine Law.

The Sunshine Law defines “public record” as “any record, whether written or electronically stored, retained by or of any public governmental body.” § 610.010(6), RSMo; *see also* § 217.075.1, RSMo (“All offender records compiled, obtained, prepared or maintained by the department [of corrections] or its divisions shall be designated public records within the meaning of chapter 610.”). There is no factual dispute that the records responsive to Plaintiffs’ Sunshine Law request are “public records.” *SUMF* at ¶ 11.

D. The records are not subject to any exceptions.

The Sunshine Law establishes Missouri’s “public policy... that meetings, records, votes, actions, and deliberations of public governmental bodies [are] open to the public unless otherwise provided by law.” § 610.011.1, RSMo. “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) (citing *Missouri Protection and Advocacy Services v. Allan*, 787 S.W.2d 291, 295 (Mo. App. W.D. 1990)). “The provisions of the Sunshine Law are to be liberally construed to promote this public policy.” *Stewart*, 85 S.W.3d at 32 (citing § 610.011.1, RSMo; *Cathcart*, 974 S.W.2d at 578).

1. Exception pursuant to § 610.021(1), RSMo.³

It is undisputed that there are no confidential or privileged attorney communications in any of the responsive documents. *SUMF* at ¶ 30. It is further undisputed that there is no litigation related to anything contained in the records responsive to the request. *Id.* at ¶ 32. Furthermore, DOC's designee admits that to the extent any of the responsive documents contain information that is subject to the exception of § 610.021(1), RSMo, any information that this Court finds might be exempt from disclosure could be redacted. *Id.* at ¶¶ 20, 33. Because the public records are not exempt from disclosure under § 610.021(1), RSMo, Plaintiffs should be granted summary judgment on the fourth affirmative defense in the First Amended Answer.

2. Exception pursuant to § 610.021(13), RSMo.⁴

It is undisputed that none of the records requested by Plaintiffs are subject to the exception in § 610.021(13), RSMo. *SUMF* at ¶ 28. Additionally, DOC's designee admits that to the extent any of the responsive documents contain information that is subject to the exception of § 610.021(13), RSMo, any information that this Court finds might be exempt from disclosure could be redacted. *SUMF* at ¶¶ 20, 29. Because the public records are not exempt from disclosure under § 610.021(13), RSMo, Plaintiffs should be

³ "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."

⁴ "Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment[.]"

granted summary judgment on the third affirmative defense in the First Amended Answer.

3. Exception pursuant to § 610.021(14), RSMo.⁵

As a matter of law, the responsive records are not exempt under § 610.021(14), RSMo.

a. Exemptions to the Sunshine Law must be statutory.

DOC asserts that all responsive documents are exempt from disclosure because 28 C.F.R. § 40.10 authorizes DOC to close them. *SUMF* at ¶¶ 18, 25. In the context of Sunshine Law exemptions, “[t]he term ‘law’ [in § 610.021(14)] has a particular meaning... It refers to statutes.” *State ex rel. Missouri Local Gov’t Ret. Sys. v. Bill*, 935 S.W.2d 659, 665 (Mo. App. W.D. 1996) (citing *Oregon Cnty. R-IV Sch. Dist. v. LeMon*, 739 S.W.2d 553, 557 (Mo. App. S.D. 1987)). *See also, Scroggins v. Missouri Dep’t of Soc. Servs., Children’s Div.*, 227 S.W.3d 498, 500 (Mo. App. W.D. 2007) (“Public records are open to the public unless a statute protects their disclosure.”). Regulatory authority to declare public records as “confidential” is insufficient to exempt a record from the Sunshine Law. Were this not the case, any department or division could promulgate rules, regulations, and policies that would circumvent their obligations under the Sunshine Law. Such an ad hoc and deferential (especially in the case of DOC⁶)

⁵ “Records which are protected from disclosure by law[.]”

⁶ *See, e.g.,* § 217.040.2, RSMo (“[DOC] shall adopt policies and operating regulations concerning only its internal management which need not be published in the Missouri Register or the code of state regulations under chapter 536 [Administrative Procedure and Review], but these regulations shall be available for public inspection and review.”).

approach to the creation of exceptions to the Sunshine Law would be contrary the explicit public policy undergirds the Sunshine Law. Plaintiff is entitled to summary judgment on Defendant's first affirmative defense for this reason alone.

- b. 28 C.F.R. § 40.10 was never mandatory and, therefore, cannot serve as the basis for an exception to the Sunshine Law.

The regulation upon which Defendant relies, 28 C.F.R. § 40.10, was one of several that promulgated to fulfill the requirements of section 7 of the Civil Rights of Institutionalized Persons Act (CRIPA), which specified that “the Attorney General shall... promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility.” CRIPA, § 7(b)(1), codified at 42 U.S.C. § 1997e (1980).

DOC was certified by the Department of Justice in 1992, at a time when –pursuant to CRIPA– pre-lawsuit exhaustion of 42 U.S.C. § 1983 claims was required only if “the Attorney General ha[d] certified or the court ha[d] determined that such administrative remedies [were] in substantial compliance with the minimum acceptable standards promulgated [by the Attorney General].” 42 U.S.C. § 1997e(a)(2).

As DOC implicitly acknowledges, the authorizing statute, 42 U.S.C. § 1997e(a)(2), as it existed from 1980 to 1995, merely permitted states to voluntarily choose to adopt administrative remedies.⁷ It did not impose a mandate on Missouri. Because the federal regulation did not require closure of public records, it does allow

⁷ “The Department is authorized to close offender grievance records [pursuant to 28 C.F.R. § 40.10], and has chosen to do so.” *SUMF* at ¶ 17.

closure of public records. The Court of Appeals decision in *Bauer v. Kincaid*, 759 F. Supp. 575 (W.D. Mo. 1991), is directly on-point. In refusing to import an “exception” to the Sunshine Law from the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, which the public governmental body had asserted made particular records protected from disclosure by law, the court noted that:

In addition, considering the liberal construction to be accorded the Sunshine Law and the correspondingly narrow construction to be accorded the exemptions, the phrase ‘protected by law’ in [§ 610.021(14)] should be narrowly construed to include only records which are prohibited from disclosure by law. A liberal reading of the exemption would conflict with the purpose and policy of the Missouri legislature in enacting the Sunshine Law which was to keep records open to public scrutiny.

759 F. Supp. at 587 (emphasis added). Because neither the regulation nor the authorizing statute prohibited Defendant from disclosing the records, Plaintiffs are entitled to summary judgment on Defendant’s first affirmative defense.

- c. The federal statutory authority for 28 C.F.R. § 40.10 (i.e., 42 U.S.C. § 1997e (1980)), has been repealed.

A third, independent reason to grant Plaintiffs summary judgment on Defendant’s first affirmative defense is that a 1996 amendment to 42 U.S.C. § 1997e eliminated section 7’s minimum standards for administrative grievance procedures and the certification process for such procedures.” *See* Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321, 1321-71 (codified at 42 U.S.C. § 1997e) (replacing requirement that exhaustion of administrative remedies be required only if Attorney General has certified or a court has determined that such administrative remedies substantially comply

with Attorney General's standards with provision that prisoner must exhaust "such administrative remedies as are available" before filing suit).

Because the statutory authority that empowered the Attorney General to promulgate 28 C.F.R. § 40.10 no longer exists, the regulation does not have the force of law, even if the regulation had required public records to be closed. *See Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1575 (Fed. Cir. 1996) (recognizing that "[w]hen a statute has been repealed, the regulations based on that statute automatically lose their vitality. Regulations do not maintain an independent life[.]"); *See Barseback Kraft AB v. United States*, 121 F.3d 1475, 1480 (Fed. Cir. 1997) (citations omitted) (nothing that "[t]he fact that DOE's Enrichment Criteria had not been formally withdrawn from the Code of Federal Regulations does not save them from invalidity.").

d. 28 C.F.R. § 40.10 does not apply to Documents 1, 2, 5, 6, 7, 9, 10, 11, 12, 13, or 14.

Finally, even if this Court were to find a regulation (28 C.F.R. § 40.10) sufficient to exempt disclosure, and were to find a federal statutory authority for promulgating that regulation, and were to find that regulation to mandating closure of open public records, 28 C.F.R. § 40.10 would only impact four of the fourteen records at issue here.

28 C.F.R. Ch. I, Pt. 40 explicitly distinguishes between "grievances" and any optional preceding "informal resolution" process which is not subject to the "minimum" Attorney General standards. 28 C.F.R. § 40.07 ("The institution may require an inmate to attempt informal resolution before the inmate files a grievance under this procedure.") (emphasis added). It is undisputed that Documents 1, 2, 5, 6, 7, 10, 11, 12, 13, and 14

concern Qandah's Informal Resolution Request and predated the Qandah's filing of grievance on April 7, 2011. *SUMF* at ¶¶ 22.c, 23. Defendant's claimed exception, 28 C.F.R. § 40.10, explicitly pertains to "[r]ecords regarding the filing and disposition of grievances." During the grievance process only four documents were prepared and maintained by Defendant – Document 3, 4, 8 and 9. *SUMF* at ¶¶ 22, 23.

4. Exception pursuant to § 217.075.1(3), RSMo.⁸

DOC's designee admits that there is no factual basis to exempt Documents 1-4 pursuant to § 217.075.1(3), RSMo. *SUMF* at ¶ 26. Furthermore, DOC's designee admits that to the extent any responsive documents contain information that is subject to the exception of § 217.075.1(3), RSMo, any information that this Court finds might be exempt from disclosure could be redacted. *SUMF* at ¶¶ 20, 27. Because the public records are not entirely exempt from disclosure under § 217.075.1(3), RSMo, Plaintiffs should be granted summary judgment on the second affirmative defense in the First Amended Answer as to Document 1-4 and redacted versions of the remaining documents.

III. Issues remaining for trial on the merits.

There are two issues that require trial on the merits. The first is whether the portions of the documents that Defendant claims are "closed" pursuant to § 217.075.1(3), RSMo, are, in fact, subject to disclosure. The second issue is whether Defendant's failure to comply with the Sunshine Law was either knowing or purposeful.

IV. Conclusion.

⁸ Exempting "[a]ny internal administrative report or document relating to institutional security."

For the foregoing reasons, Plaintiffs respectfully request that this Court grant them partial summary judgment and determine that 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) Defendants cannot prove their 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). Further, subject to the grant of partial summary judgment, this Court should order Defendant to disclose to Plaintiffs unredacted copies of Documents 1-4 and redacted copies of Documents 5-14. Finally, this Court should set a trial on the issues of whether the redacted portions of Documents 5-14 are, in fact, exempt from disclosure and whether the non-compliance with the Sunshine Law was knowing or purposeful.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'AR' with a flourish.

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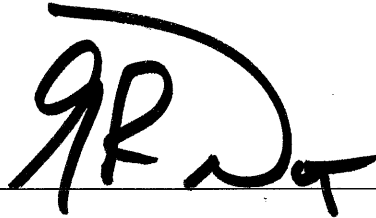
Certificate of Service

I certify that on September 26, 2013, I placed a copy of the Plaintiffs' Memorandum in Support of their Motion for Summary Judgment in the U.S. mail (first class) for:

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I further certify that I emailed an electronic copy of the above referenced document to You-Jin.Han@ago.mo.gov on September 27, 2013.



A handwritten signature in black ink, appearing to read 'JR' followed by a stylized flourish, is written over a horizontal line.