IN THE CIRCUIT COURT OF COLE COUNTY
NINETEENTH JUDICIAL CIRCUIT
STATE OF MISSOURI

AARON M. MALIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 15AC-CC00573
	)	
COLE COUNTY PROSECUTING ATTORNEY,	)	Division No. IV
	)	
Defendant.	)	

ORDER AND JUDGMENT

This cause comes before this Court on Plaintiff's Motion for Summary Judgment. Being fully advised, the Court now enters its ruling and grants Plaintiff's motion.

Findings of Fact

Plaintiff's Motion for Summary Judgment identified and enumerated 164 uncontroverted material facts. In response, Defendant attempted to controvert just two of Plaintiff's facts. However, because Defendant's response did not "set forth each statement of fact in its original paragraph number and immediately thereunder admit or deny each of movant's factual statements[,]" nor did Defendant "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[,]" all of Plaintiff's factual assertions are considered admitted by this Court. Rule 74.04(c)(2).[1] Thus, the following facts are uncontroverted:

[1] All Rule references are to the Missouri Supreme Court Rules, as updated, unless otherwise noted.

1. Defendant Cole County Prosecuting Attorney is a "public government body" as defined by §610.010(4) and is subject to the requirements of the Missouri Sunshine Law. Petition ¶¶ 6-7, 35; Answer ¶¶ 3, 6.[2]
2. On April 1, 2015, Plaintiff Aaron Malin delivered a written request to defendant Cole County Prosecuting Attorney's custodian of records, Mark A. Richardson, seeking copies of "[a]ny correspondence or communication between the Office of the Prosecuting Attorney of Cole County (or its associates/employees) and the MUSTANG drug task force (or its associates/employees)." *Plaintiff's MSJ Exhibit 1-A, Apr. 1, 2015 request*; Petition ¶ 8; Answer ¶ 3.
3. Malin's request specifically noted that the records should be provided without redactions or only with those redactions permitted by law and asked that, "[i]f any part of this request is denied, please list specific exemptions upon which you rely for each denial." *Exhibit 1-A*; Petition ¶ 9; Answer ¶ 3.
4. Malin did not receive any response to his April 1, 2015 Sunshine Law Request for seven days, at which time the request was denied with a letter and no documents were provided. *Plaintiff's MSJ Exhibit 1-B, Apr. 8, 2015 response; Plaintiff's MSJ Exhibit 1, Depo. of Mark Richardson, p. 11: 2-3, 12:10-11*; *Exhibit 1-B*; Petition ¶ 12; Answer ¶ 3.
5. Richardson's denial letter stated:

> The records you requested, even if they existed, would not be categorized. To search, categorize, and compile such records would be unduly burdensome. The costs to find and copy would be hard to calculate. Without confirming or denying the existence of records you requested, any official records of this office would be closed to the public.

Exhibit 1-B, ¶¶ 2-3; Petition ¶ 13; Answer ¶ 3.

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[2] All statutory citations are to Missouri Revised Statutes (2000), as updated, unless otherwise noted.

6. In the denial letter, Richardson cited only §§ 610.105, 610.100, and 610.120 as the authority for denying Malin's request. *Exhibit 1-B,* ¶ 3; Petition ¶ 14; Answer ¶ 3.
7. After this lawsuit was filed, Richardson said that he also refused to provide any records in response to Malin's April 1, 2015 request based upon an attorney/client privilege. *Exhibit 1, Depo. of Mark Richardson, p. 11:22-12:3.*
8. In written correspondence following the request and denial, Malin's attorney reminded Richardson that a prosecutor's office is a public governmental body whose records are public unless they can be closed under the law, that Richardson failed to explain how the statutory sections cited in the denial letter applied to Malin's request, that even records that can be partially closed must be produced and any redactions permitted must be identified and justified by the applicable law allowing for such redaction. *Plaintiff's MSJ Exhibit 1-C, Apr. 13, 2015 letter,* ¶ 2; *Exhibit 1, Depo. of Mark Richardson, p. 13:18*; Petition ¶ 16; Answer ¶ 5.
9. The correspondence from Malin's attorney included a detailed description of the penalties that can be imposed if a government body is found to have violated the Sunshine Law. *Exhibit 1-C, p. 2,* ¶ 3.
10. Neither Malin nor his attorney received any further correspondence related to Malin's April 1, 2015 Sunshine Law request. *Exhibit 1, Depo. of Mark Richardson, p. 13:23-25*; Petition ¶ 18; Answer ¶ 5.
11. While Richardson failed to provide any responsive documents or calculate the cost of compiling such documents, he nevertheless admitted that there are documents in his office that are responsive to Malin's request for correspondence or communications

between his office and the MUSTANG Drug Task Force or its associates or employees. *Exhibit 1, Depo. of Mark Richardson, pp. 12:17-21; 14:8-12.*

12. Richardson admitted that he did not search for any such records with his reason being that his office "do[es] not keep a list of those officers." *Exhibit 1, Depo. of Mark Richardson, p. 14: 14-16.*

13. However, Richardson also admitted that probable cause statements do sometimes indicate they were filled out by a Mustang Task Force Officer. *Exhibit 1, Depo. of Mark Richardson, p. 15:6-8.*

14. Richardson did not search for any of the records requested by Malin. *Exhibit 1, Depo. of Mark Richardson, p. 16:23-17:13.*

15. At the time the request was made, Richardson admitted that he had records of communications between his office and Gregory Bestgen who had been assigned to the Mustang Drug Task Force at various times and information about Gregory Bestgen being a Mustang Drug Task Force officer might be contained in probable cause statements or reports in Richardson's office. *Exhibit 1, Depo. of Mark Richardson, p. 26:9-27:3, 27:15-24.*

16. Similarly, Michael Sneller has been a Mustang Drug Task Force officer and has communicated with Richardson's office. *Exhibit 1, Depo. of Mark Richardson, p. 28:3-9.*

17.

18. While he maintained that he was not required to conduct a search for responsive records, Richardson admitted that a consulting company did run a search on some names of task force members and identified responsive records but, despite this, those records would

not be released absent a court order. *Exhibit 1, Depo. of Mark Richardson, p. 29:18-25; 30:16.*[3]

19. Richardson admitted that probable cause statements are retained in his office. *Exhibit 1, Depo. of Mark Richardson, p. 35:18-21.*

20. Richardson took the position that requested records were either closed and would not be produced by his office or, if they were open records, they would have to be obtained from the court. *Exhibit 1, Depo. of Mark Richardson, p. 37:12-20.*

21. Richardson admitted that some of the probable cause statements retained in his office contain a sentence identifying them as coming from a Mustang Task Force Officer. *Exhibit 1, Depo. of Mark Richardson, p. 39:13-19.*

22. With regard to police reports, Richardson acknowledged that his office retained them but indicated that they are not open records. *Exhibit 1, Depo. of Mark Richardson, p. 53:5-6.*

23. Asked to identify the Sunshine Law provision he was relying upon to justify his position that police reports did not have to be provided, Richardson referred back to his denial letter. *Exhibit 1, Depo. of Mark Richardson, p. 53:20-54:2, referring to Exhibit 1-B.*

24. Richardson then conceded that the statutes cited in his letter do not allow him to close the records at issue. *Exhibit 1, Depo. of Mark Richardson, p. 54:13-19.*

25.

26. On October 22, 2015, Malin delivered a second written request to Richardson seeking "[a]ny indictments handed down in Cole County between July 1, 2014 and the present,

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[3] Richardson admitted that he asked RB Consulting to search only his computer records; Richardson did not request a search all of the computers or all of the e-mail addresses included within defendant Cole County Prosecuting Attorney's office. And, despite citing "taxpayer money" as his justification or not conducting a more expansive search, Richardson admitted that he did not know the cost of the search that was conducted. Richardson also stated that searching additional computers and e-mail records "would be unduly burdensome, expensive, and there's no duty that I have under the Sunshine Law to go through individual files and individual computer servers to search through e-mails and archived e-mails for that information." *Exhibit 1, Depo. of Mark Richardson, p. 30:3-14.*

limited to indictments for selling narcotics in public housing." *Plaintiff's MSJ Exhibit 1-D, Oct. 22, 2015 request*; Petition ¶¶ 19, 22; Answer ¶ 5.

27. Again, Malin's request specifically noted that the records should be provided without redactions or with only those redactions permitted by law and asked that, "[i]f any part of this request is denied, please list specific exemptions upon which you rely for each denial." *Exhibit 1-D*; Petition ¶¶ 20-21; Answer ¶ 5.

28. Richardson denied Malin's request in a letter dated October 23, 2015. *Plaintiff's MSJ Exhibit 1-E, Oct. 23, 2015 response*; Petition ¶ 23; Answer ¶ 5.

29. Richardson's denial letter stated:

> The records you have requested are not categorized. To search, categorize, and compile such records would be unduly burdensome. The costs to find and copy would be hard to calculate. Without confirming or denying the existence of records you requested, any official records of this office would be closed to the public.
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> *Exhibit 1-E*; Petition ¶ 24; Answer ¶ 5.

30. Richardson cited only §§ 610.105, 610.100, and 610.120 as the authority for his denial of Malin's October 22, 2015 request. *Exhibit 1-E*; Petition ¶ 25; Answer ¶ 5.

31. Malin did not receive any further correspondence or documents related to his October 22, 2015 request. *Exhibit 1, Depo. of Mark Richardson, p. 43:6-13*; Petition ¶ 26; Answer ¶ 5.

32. Richardson acknowledged that indictments are drafted and retained by his office. *Exhibit 1, Depo. of Mark Richardson, p. 41:18-23; 43:14-24; 44:2-9.*

33. Richardson stated that he did not provide documents in response to Malin's October 22, 2015 request because they are closed records (specifically, he indicated that drafts of indictments retained by his office are work product) and indictments would have to be

obtained from the court. *Exhibit 1, Depo. of Mark Richardson, p. 43:6-44:13; 44:2-6, 44: 14-17.*

34. Richardson did not search the files in his office for any indictments. *Exhibit 1, Depo. of Mark Richardson, p. 63:4-6, 14-15.*

35. Richardson admitted that, in October of 2015, he could have gotten a report of drug sales cases "and if this charge code under Count I is specific to public housing, I should have been able to find and run that." *Exhibit 1, Depo. of Mark Richardson, p. 64:8-11.*

36. Richardson's position at his deposition on failing to produce the requested records was that: "Our files are not open to the public. Because we're under rules of keeping them confidential." *Exhibit 1, Depo. of Mark Richardson, p. 67:15-16.*

37. On October 30, 2015, Malin delivered a third written request to defendant's custodian of records, Mark Richardson, seeking copies of "any Sunshine Law (or open records) requests received by the Cole County Prosecutor's Office, as well as any responses provided, between January 1, 2015 and the present." *Plaintiff's MSJ Exhibit 1-K, Oct. 30, 2015 request*; Petition ¶¶ 27, 30; Answer ¶ 5.

38. As he did with his previous two requests, Malin's third request specifically noted that the records should be provided without redactions or with only those redactions permitted by law and asked that, "[i]f any part of this request is denied, please list specific exemptions upon which you rely for each denial." *Exhibit 1-K*; Petition ¶¶ 28-29; Answer ¶ 5

39. Mark Richardson denied Malin's request in a letter dated October 30, 2015. *Plaintiff's MSJ Exhibit 1-L, Oct. 30, 2015 response*; Petition ¶ 31; Answer ¶ 5.

40. Richardson's denial letter stated:

> The records you have requested are not categorized. To search, categorize, and compile such records would be unduly burdensome. The costs to find and copy would be hard

to calculate. Without confirming or denying the existence of records you requested, any official records of this office would be closed to the public.

Exhibit 1-L; Petition ¶ 32; Answer ¶ 5.

41. Again, Richardson cited only §§ 610.105, 610.100, and 610.120 as the authority for his denial of Malin's October 22, 2015 request. *Exhibit 1-L*; Petition ¶ 33; Answer ¶ 5.

42. Malin did not receive any further correspondence related to his October 30, 2015 request prior to filing this lawsuit. *Exhibit 1, Depo. of Mark Richardson, p. 71:15*; Petition ¶ 34; Answer ¶ 5.

43. The records disclosed in response to Malin's third Sunshine Law request were provided only after he filed the above-captioned case. *Exhibit 1, Depo. of Mark Richardson, p. 75:23-76:11.*

44. Richardson admitted he would not have responded to Malin with the documents absent the lawsuit being filed. *Exhibit 1, Depo. of Mark Richardson, p. 76:12-16.*

45. Despite providing some responsive documents to Malin's third request after the lawsuit was filed, however, Richardson failed to include his office's responses to the Sunshine Law requests, even though he acknowledged that the request asked for these responses. *Exhibit 1, Depo. of Mark Richardson, p. 77:24-78-9, 78:13-18.*

46. Richardson admitted that he was not going to disclose any information in response to Malin's three separate Sunshine Law requests, and admitted further that, even the records he did disclose were only disclosed because Malin filed the instant lawsuit. *Exhibit 1, Depo. of Mark Richardson, p. 92:6-20; 93:4-7.*

47. Richardson judicially admitted that the records Malin requests on October 30, 2015 are public records and "[n]one of the provisions of Chapter 610 permit [him] to withhold the records requested on October 30, 2015." Petition ¶¶ 42-43; Answer ¶¶ 12-13.[4]

48. Richardson is an attorney licensed to practice in the State of Missouri. *Exhibit 1, Depo. of Mark Richardson*, p. 7.

49. Richardson has been licensed to practice law in the State of Missouri since 1984. *Exhibit 1, Depo. of Mark Richardson*, p. 7-8.

50. Richardson served seven and a half years as a Municipal Judge for Jefferson City, Missouri. *Exhibit 1, Depo. of Mark Richardson*, p. 7.

51. Richardson "taught public records release back earlier in [his] career to state agency officials." *Exhibit 1, Depo. of Mark Richardson, p. 55:21-23.*

52. Roland's April 13, 2015 letter to Richardson clearly stated that its intent was to remove any question that Richardson was aware of both his obligations under the Sunshine Law and of the consequences for failing to fulfill those obligations. *Exhibit 1-C*, p. 2, ¶ 3.

53. This lawsuit was filed on December 9, 2015.

Conclusions of Law

Summary judgment is warranted when 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 non-moving party has the

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[4] "A judicial admission is an act done in the course of judicial proceedings that concedes for the purpose of litigation that a certain proposition is true. Judicial admissions are generally conclusive against the party making them." *Moore Automotive Group, Inc. v. Goffstein*, 301 S.W.3d 49, 54 (Mo. banc 2009) (citations omitted). "A party is bound by their pleadings. Generally, 'allegations in a petition, admitted in an answer, are judicial admissions and obviate the need for any evidence on that issue.'" *J.H. Berra Paving Co., Inc. v. City of Eureka*, 50 S.W.3d 358, 362 (Mo. App. E.D. 2001).

burden to establish that a controversy remains. *Martin v. City of Washington,* 848 S.W.2d 487, 492 (Mo. banc 1993). "Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." *ITT Commercial Fin. Corp.*, 854 S.W.2d at 380.[5] As noted, Defendant did not contradict any of Plaintiff's asserted facts.

The Sunshine Law's public recordkeeping and disclosure provisions apply to all "public governmental bodies." § 610.011. The statute defines a "public governmental body" as "any department or division of the state [or] of any political subdivision of the state." § 610.010(4)(c). There is no dispute that the Cole County Prosecuting Attorney is a governmental body subject to 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). "The emphasis is not on the nature of the document, but on who prepared or retains the record." *City of Springfield v. Events Publ'g Co.*, 951 S.W.2d 366, 371 (Mo. App. S.D. 1997). Public records are "presumed open to public inspection." *N. Kansas City Hosp. Bd. of Trustees v. St. Luke's Northland Hosp.*, 984 S.W.2d 113, 119 (Mo. App. W.D. 1998). If a government body claims that an exception to the general rule of openness applies, the burden of persuasion shifts to the government. § 610.027.2; *see Colombo v. Buford*, 935 S.W.2d 690, 693 (Mo. App. W.D. 1996).

The Sunshine Law requires that requests be "acted upon as soon as possible, but in no event later than the end of the third business day" following receipt of the request by the custodian of records. § 610.023. "If access to the public record is not granted immediately, the custodian shall give a detailed explanation of the cause for further delay and the place and

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[5] As noted above, Defendant has failed to properly controvert any of Plaintiff's asserted facts and they are therefore all considered to be true for the purposes of summary judgment.

earliest time and date that the record will be available for inspection." *Id.* "The period for document production may exceed three days for reasonable cause." *Id.*

In addition to the statutory requirement that a request be acted upon within three days unless there is reasonable cause to extend the time for a response, under the statutory scheme established by the Sunshine Law, a citizen has a right to know *why* the government is denying their records request when that request is denied. § 610.021.4. Part of the function of § 610.021.4 is to inform the citizen of the position the public governmental body will take in the event that the citizen decided to go to Court in order to obtain a ruling on the openness of certain requested records. This allows the citizen to be fully informed before they commit to spending the time, money, and effort necessary to seek a court judgment under the Sunshine Law. If, after a citizen has filed a lawsuit under § 610.027, a public governmental body could simply introduce new, previously undisclosed justifications for having denied a citizen's request for public records, § 610.021.4 would be rendered pointless because a citizen would never know whether the reason they were initially given for the denial of their records request was the "real" reason or whether the governmental body will produce additional justifications after a lawsuit is filed.

If such a tactic was permitted, citizens who were simply trying to promote government transparency would face additional uncertainty in evaluating whether to undertake legal action to enforce their rights because—as here—they would find themselves facing unexpected expenses as a result of having to confront unanticipated, different justifications for the government's denial of their request. Not to mention that they may face justifications that they would have chosen not to challenge had they been presented in the government's initial denial. This Court interprets § 610.021.4 as acting in concert with the rest of the Sunshine Law to ensure that citizens will be fully informed, prior to initiating legal action regarding a records request that has

been denied, as to the legal bases on which the public government body will rely to defend the denial. Consequently, the Defendant is prohibited from asserting, and this Court will not consider, any of the *post hoc* justifications for its denial and will consider only those it stated in its three initial denial letters to Malin.[6]

"Section 610.027 allows any aggrieved person to seek judicial enforcement of the Sunshine Law and provides the remedies of civil monetary penalties, costs and attorney's fees for knowing or purposeful violations of that law." *Laut v. City of Arnold*, 491 S.W.3d 191, 197 (Mo. banc 2016). Knowing and purposeful violations of the Sunshine Law must be supported by a preponderance of the evidence. § 610.027.3-.4. The Sunshine Law shall be liberally construed and its exceptions strictly construed in order to promote openness and government transparency. *See Laut*, 491 S.W.3d at 196. "[T]he 'portions of the Sunshine Law that allow for imposition of a civil penalty and an award of attorney fees and costs are penal in nature and must be strictly construed.'" *Id.* (quoting *Strake v. Robinwood West Cmty. Improvement Dist.*, 473 S.W.3d 642, 645 n.5 (Mo. banc 2015)). "What constitutes a knowing or purposeful violation of the Sunshine Law is a question of law." *Laut*, 491 S.W.3d at 193.

"[A] purposeful violation occurs when the party acts with 'a conscious design, intent, or plan to violate the law and d[oes] so with awareness of the probable consequences.'" *Laut*, 491 S.W.3d at 198 (quoting *Strake*, 473 S.W.3d at 645). "Plaintiff must show that the conscious plan or scheme, the purpose of the conduct, was to violate the law." *Id.* at 199. "Purposeful conduct

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[6] Defendant's *post hoc* justifications include the following: (1) attorney-client privilege, contending that any communications between him and any law enforcement officers would necessarily be privileged; (2) the argument that Malin's requests—at least in part—were so "non-specific" as to render Richardson incapable of discerning exactly what information Malin was seeking; and (3) without any supporting evidence, argument, or discussion, that responding to Malin's requests would "create[] safety risk, jeopardize[] an investigation, or reveal[] information relating to law enforcement techniques and procedures."

means more than actual knowledge." *Id.* "A purposeful violation involves proof of intent to defy the law or achieve further some purpose by violating the law." *Id.* at 200 (citing *Strake*, 473 S.W.3d at 646, and noting that the violation there was knowing and purposeful because the governmental body had actual knowledge of its obligations under the Sunshine Law yet chose not to disclose open records in an effort—i.e., "plan"—to avoid liability for breach of contract). "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." *Buckner v. Burnett*, 908 S.W.2d 908, 911 (Mo. banc 1995).

"A knowing violation requires proof that the public governmental body had 'actual knowledge that [its] conduct violated a statutory provision.'" *Strake*, 473 S.W.3d at 645 (quoting *White v. City of Ladue*, 422 S.W.3d 439, 452 (Mo. App. E.D. 2013)); *see also Laut*, 491 S.W.3d at 198. "The court, therefore, must find that the defendant knew it was violating . . . the Sunshine Law for the statute to authorize a fine or penalty." *Laut*, 491 S.W.3d at 199. Thus, "a knowing violation requires knowledge of the violation and . . . a purposeful violation requires proof of a conscious plan or design to violate the statute." *Id.*

"Whether the conduct of [a governmental body] brings it within the scope of the statutory definitions of knowing or purposeful conduct is a question of fact." *Id.* at 196. However, there is no requirement that a governmental entity knew it was violating the law for this Court to find that a violation occurred; proof of knowledge and/or intent is necessary only for imposition of a penalty, costs, and fees. *See Laut*, 491 S.W.3d at 200. If a knowing violation is found, a penalty (in an amount up to $1,000) is mandatory and an award of costs and reasonable attorneys' fees is discretionary with this Court. § 610.027.3. Upon finding that the violation was purposeful, however, penalty (in an amount up to $5,000), costs, and reasonable attorneys' fees are

mandatory. § 610.027.4. "The court shall determine the amount of the penalty by taking into account the size of the jurisdiction, the seriousness of the offense, and whether the public governmental body or member of a public governmental body has violated sections 610.010 to 610.026 previously." § 610.027.3-.4.

There is no dispute that the Cole County Prosecuting Attorney is a "public governmental entity" as defined by § 610.010(4). There is no dispute that Richardson is the custodian of records, three separate requests for public records were made to Defendant. There is no dispute that Defendant is aware of a government body's responsibilities related to the Sunshine Law. There is no dispute that the Sunshine Law applies to these requests. And, there is no dispute that Richardson's office does, in fact, retain public records responsive to at least two of Plaintiff's three requests. Nevertheless, the record before this Court shows that the Defendant intentionally chose, with full knowledge of the consequences, not even to *look* for documents related to the Plaintiff's public records requests, much less produce any responsive documents. Plalintiff's first request sought "[a]ny correspondence or communication between the Office of the Prosecuting Attorney of Cole County (or its associates/employees) and the MUSTANG drug task force (or its associates/employees)." Plaintiff's second request sought "[a]ny indictments handed down in Cole County between July 1, 2014 and the present, limited to indictments for selling narcotics in public housing." Plaintiff's third request sought "any Sunshine Law (or open records) requests received by the Cole County Prosecutor's Office, as well as any responses provided, between January 1, 2015 and the present." Defendant denied each of Plaintiff's requests with a substantially identical form letter indicating that Richardson would not even look for responsive documents.

Additionally, for the first request, Richardson failed to timely respond,[7] and when he did respond, he cited only three statutory sections as justification for his refusal to produce the records: §§ 610.105, 610.100, and 610.120. For the second and third requests, Richardson again cited only to the same three statutory sections as his justification for refusing to produce the records.[8] Thus, for all three requests, Richardson took the position that the office's files—*all* of them—are closed records not subject to production under the Sunshine Law. Consequently, Richardson refused to provide Malin with copies of or access to the requested records in response to his Sunshine Law requests.

There is no support for Richardson's position that the Sunshine Law did not require him even to search for (much less produce) the records responsive to Malin's requests. *See, e.g.*, *Tuft v. City of St. Louis*, 936 S.W.2d 113, 116 (Mo. App. E.D. 1996); § 610.027.2. Richardson's boilerplate response was not an effort to justify withholding specific, identified records on the basis that they were found to fit within an exception that some statute provides to the ordinary requirements of the Sunshine Law. To the contrary, Richardson took the position that he would not even conduct a search for responsive documents because, as he asserted, every record retained by his office was exempted from disclosure under the Sunshine Law. This position is indefensible, particularly in light of § 610.011. Although the Sunshine Law does exempt certain

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[7] Richardson plainly did not respond to Malin's first request within three business days. To the extent that Richardson offers explanations for his late response, "none of those circumstances excuses the late response in violation of the Sunshine Law." *Swaine v. Robert McCulloch*, Case No. 15SL-CC03842, p. 4 (Cir. Ct. County of St. Louis, January 4, 2016 Order). Consequently, Richardson violated § 610.023.3.

[8] Although each of Malin's three requests sought different types of public records, Richardson's responses to those requests were uniform. Each response stated that the records requested were "not categorized." The responses each then incorporated the following boilerplate language:

> To search, categorize, and compile such records would be unduly burdensome. The costs to find and copy would be hard to calculate. Without confirming or denying the existence of the records you requested, any official records of this office would be closed to the public. See, sections 610.105, RSMo., 610.100, RSMo., and 610.120, RSMo.

records from disclosure to the public, here, a custodian of records could not possibly determine that the public records responsive to Malin's requests were exempt from disclosure without first identifying records responsive to the requests and assessing whether they fall within an exemption provided by law. Moreover, the statutory sections Richardson cited as the justification for withholding public documents do not apply to the types of records Malin requested.

Section 610.100, addresses various types of records that might be retained by law enforcement agencies, providing that certain of these types of records "shall be open records," certain of these types of records "are closed records," and certain other of these types of records are "authorized to be closed." Nothing in § 610.100 authorizes a custodian of records for a public governmental entity to simply refuse to search for records a citizen has requested; indeed, the distinctions among these types of records *requires* a custodian of records to review the requested records to determine whether any records that are responsive are subject to disclosure or whether they are "closed records" under this statute. Richardson's letters to Malin made no effort to explain why every record retained by the Office (much less the specific records Malin had requested) might be "closed" pursuant to § 610.100. Moreover, the Sunshine Law does not categorize either an indictment or a draft of an indictment as a closed record. *See* Section 610.100.

Section 610.105 states that "official records pertaining to" a case in which a person is charged with a crime are to be "closed" if "the case is subsequently nolle prossed, dismissed, or the accused is found not guilty or imposition of sentence is suspended[.]" Nothing in § 610.105 authorizes a custodian of records for a public governmental entity to simply refuse to search for records a citizen has requested; indeed, because the exemption created under this statute depends on the eventual outcome of a case, it requires a custodian of records to review the requested

records to determine whether they are open records subject to disclosure. Richardson's letters to Malin made no effort to explain why every record retained by the Office (much less the specific records Malin had requested) might be "closed" pursuant to § 610.105.

Section 610.120 does not identify any particular type or category of records to be "closed," but rather describes how closed public records are to be stored and under what circumstances closed public records may be provided to certain persons or entities. If, as in this case, a custodian of records has not identified a statute under which a requested public record is "closed," § 610.120 has no application.

In addition to the statutory sections cited not supporting Richardson's refusal, it is important to note that refusing to look for responsive records, as opposed to refusing to produce them with a stated justification specific to the records requested, is a much more severe violation of the Sunshine Law because—as is demonstrated by the facts of this case—it thoroughly forecloses the requesting citizen's opportunity to know that the public governmental body actually holds public records responsive to the citizen's request, much less whether those records fall within any statutory exception to the Sunshine Law. Where a custodian of records has refused even to look for public records responsive to a citizen's request, it forces the citizen either to undertake the stress and expense of litigation without knowing whether records exist at all, or abandon any hope of gaining access to any open records.

This Court therefore concludes that a custodian of records for a public governmental body violates § 610.023.2 if they refuse to conduct a search to determine if that public governmental body possesses records responsive to a citizen's request or if the custodian of records asserts that all of a public governmental body's records are simply off-limits for inspection by members of the public. Section 610.023.2 specifies that "[e]ach public

governmental body shall make available for inspection and copying by the public of that body's public records." A custodian's refusal even to search for public records responsive to a citizen's request necessarily violates the statutory requirement to make the public governmental body's records available for inspection and copying by the public because, as in this case, the custodian's determination completely forecloses citizen access to any open public records retained by the public governmental body.

The record in this case shows seven distinct Sunshine Law violations: (1) Richardson's failure to provide a timely response to Malin's First Request; (2) Richardson's refusal to search for records responsive to Malin's First Request; (3) Richardson's refusal to search for records responsive to Malin's Second Request; (4) Richardson's refusal to search for records responsive to Malin's Third Request; (5) Richardson's failure to identify any valid justification for withholding the public records Malin requested in his First Request; (6) Richardson's failure to identify any valid justification for withholding the public records Malin requested in his Second Request; and (7) Richardson's failure to identify any valid justification for withholding the public records Malin requested in his Third Request.

Richardson was not ignorant of his obligations under the Sunshine Law. Not only is he a licensed attorney primarily responsible for ensuring the enforcement of laws in Cole County, but he has taught state agency officials how to respond to public records requests. Moreover, Malin's attorney specifically reminded Richardson of his obligations under the Sunshine Law in writing. Additionally, as noted, a public official commits a purposeful violation of the Sunshine Law if they "forestall production of public records until the requester sues[.]" *Buckner*, 908 S.W.2d at 911. Here, Richardson refused to search for the requested records despite acknowledging that he retained records that were likely responsive to the requests and made clear that he had no

intention of producing any records without a court order. The statutory sections cited by Richardson in his form denial letters were not specific to the requests made and there is no indication that they apply to any of the records that should have been produced. And, as noted, this Court will not consider any *post hoc* justifications for refusing to produce (or search for) the records. Richardson knew that his office was subject to the Sunshine Law and was fully aware of the requirements under the law. Despite this knowledge, he intentionally refused to provide the records—or even search for any responsive records—and he did so with full awareness of the consequences and with conscience design to violate the law. Thus, Richardson's office knowingly and purposely violated the Sunshine Law. Because the violation was knowing and purposeful, Malin is entitled to an award of costs and attorneys' fees and a civil penalty will be ordered against Defendant.

In calculating an appropriate civil penalty, § 610.027 requires a court to consider "the size of the jurisdiction, the seriousness of the offense, and whether the public governmental body has violated sections 610.010 to 610.026 previously." Cole County has a population of approximately 76,000,[9] making it the fifteenth largest of Missouri's 114 counties. Although the Defendant's delay in responding to Malin's First Request was not especially serious, Richardson's abject refusal either to search for records responsive to Malin's request or to offer a valid provision of law as the basis for withholding specific responsive records—particularly when directly informed of his legal obligation to do so—is a serious violation. On this record, it does not appear that Richardson's office has previously been shown to have knowingly or purposefully violated the Sunshine Law. In light of these various factors, the Court awards Malin

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[9] Number drawn from U.S. Census website at https://www.census.gov/quickfacts/table/RHI805210/29051. The Court may take judicial notice of U.S. Census records. *In the Matter of Missouri-American Water Company*, 2017 WL 977284, *2, fn4 (Mo. banc March 14, 2017).

a civil penalty of $100 for Richardson's delay in responding to Malin's First Request, and $2,000 each for Richardson's six additional violations—a total penalty of $12,100.

IT IS THEREFORE ORDERED AND DECREED:

1. Defendant knowingly and purposely violated the Sunshine Law.
2. Defendant must search for and produce all open records responsive to Plaintiff's requests, which includes the following:
    a) any correspondence or communication between the Office of the Prosecuting Attorney of Cole County (or its associates/employees) and the MUSTANG drug task force (or its associates/employees);
    b) any indictments handed down in Cole County between July 1, 2014 and the present, limited to indictments for selling narcotics in public housing; and
    c) any Sunshine Law (or open records) requests received by the Cole County Prosecutor's Office, as well as any responses provided, between January 1, 2015 and the present.
3. Defendant is ordered to pay a $12,100 civil penalty to Plaintiff.
4. Defendant is further ordered to pay Plaintiff's costs and reasonable attorneys' fees.
5. Within 14 days from the date of this judgment, the parties shall submit all materials related to their position regarding the amount of such attorneys' fee award for the Court's consideration. This judgment shall be amended accordingly and, upon amendment, shall become final.

10.11.17 The Honorable Patricia Joyce Date