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

American Civil Liberties Union of Missouri Foundation, Inc., et al.	)	
Plaintiffs,	)	
	)	Case No.: 18AC-CC00034
v.	)	
Missouri Department of Health and Senior Services,	)	Division: 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

The following material facts are uncontroverted:

1. Defendant, Missouri Department of Health and Senior Services (DHSS), is a "public governmental body" pursuant to § 610.010(4).[1]

2. Plaintiffs, Daniela Velázquez, Lindsey Vehlewald, and American Civil Liberties Union of Missouri Foundation, submitted a Sunshine Law request to Defendant on November 16, 2017, seeking "any lab test results relating to any liquid alleged to have been thrown at police during protests on September 17, 2017."

3. Defendant received Plaintiffs' request on November 16, 2017, and on November 21, 2017, Defendant notified Plaintiffs that it would not disclose the responsive records.

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[1] All statutory citations are to Missouri Revised Statutes (2016), unless otherwise noted.

4. Defendant cited §§ 610.021(14) and 610.000.2(2) for justification of its refusal to produce the requested records, and indicated that the records were refused because of an "ongoing criminal investigation."

5. The Missouri Public Health Laboratory is a laboratory within Defendant DHSS and the laboratory test results requested by Plaintiffs were created and maintained by Defendant.

6. Neither the DHSS nor the Missouri Public Health Laboratory within that Department possesses the authority, duty, or power to arrest.

7. Any investigation conducted by a law enforcement agency of Missouri, of any county, or of any municipality related to liquids allegedly thrown at police during protests on September 17, 2017, is inactive.

8. This lawsuit was filed on January 23, 2018.

9. Plaintiffs were not provided any responsive records by Defendant until July 17, 2018.

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 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.

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). Here, the Defendant has not met its burden of establishing that the responsive records can be closed.

The records at issue are open

A "public record" subject to disclosure under the Sunshine Law includes:

> any record, whether written or electronically stored, retained by or of any public governmental body including any report, survey, memorandum, or other document or study prepared for the public governmental body by a consultant or other professional service paid for in whole or in part by public funds, including records created or maintained by private contractors under an agreement with a public governmental body or on behalf of a public governmental body.

§ 610.010(6). In this case, Defendant does not dispute that it is subject to the requirements of the Sunshine Law or that it created and maintains the requested records. Instead, Defendant attempted to avoid producing the open responsive records by relying on §§ 610.021(14) and 610.100.2(2) as justification for nondisclosure, claiming that the records were part of an ongoing criminal investigation.

Section 610.021(14) provides that records may be closed when they "are protected from disclosure by law." The term "law" in this context "refers to statutes." *State ex rel. Mo. Local Gov't Retirement Sys. v. Bill*, 935 S.W.2d 659, 665 (Mo. App. W.D. 1996). As noted, the other statute relied upon by Defendant in this case is § 610.100.2(2). In relevant part, § 610.100.2(2) provides the following: "investigative reports of all law enforcement agencies are closed records until the investigation becomes inactive." (Emphasis added). However, it is clear from the text of this exception that it applies to law enforcement agencies only, and Defendant is not a law enforcement agency under the Sunshine Law.

In *Scroggins v. Missouri Department of Social Services, Children's Division*, 227 S.W.3d 498 (Mo. App. W.D. 2007), the Court of Appeals found that a state agency was *not* a law enforcement agency for two reasons. First, the agency did not have the power to arrest. *Id.* at 501–02. Second, the fact that a statute required the agency to work *with* appropriate law enforcement agencies "clearly indicates that the legislature did not consider DSS to be a 'law enforcement agency.'" *Id.* at 502. The undisputed lack of arrest powers alone is sufficient to exclude Defendant from being a law enforcement agency. *See Brandsville Fire Prot. Dist. v. Phillips*, 374 S.W.3d 373, 380 (Mo. App. S.D. 2012) (finding that a fire protection district was not a law enforcement agency because its employees lacked the power to "make arrests in their capacity as public servants, seize evidence, or fully investigate seized evidence"). But, as in *Scroggins*, there is also an applicable statute that requires the Defendant to report certain incidents of substantiated elder abuse to a "law enforcement agency." § 192.2425. Similar to *Scroggins*, this demonstrates that the legislature did not consider or intend for Defendant to be a "law enforcement agency" under the Sunshine Law.

Thus, while Defendant may at times work with law enforcement agencies, Defendant itself is *not* a law enforcement agency and therefore cannot rely on Sunshine Law exceptions that apply only to such agencies. Moreover, even if Defendant were a law enforcement agency, the records requested by Plaintiffs are nonetheless open because any investigation was inactive.

The violation was knowing and purposeful

The record in this case further supports a finding that Defendant's refusal to disclose the requested records was both knowing and purposeful. 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 v. City of Arnold*, 491 S.W.3d, 191, 196 (Mo. banc 2016) (noting that "the '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.'" (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. Courts look to both the governmental body's conduct at the time of its response to a Sunshine request and to its conduct throughout the course of the litigation to determine whether the violation was knowing or purposeful. *Chasnoff v. Mokwa*, 466 S.W.3d 571, 584 (Mo. App. E.D. 2015); *R.L. Polk & Co. v. Mo. Dept. of Revenue*, 309 S.W.3d 881, 887 (Mo. App. W.D. 2010).

"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." *Id.*

"[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.'" *Id.* 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 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).

"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. 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, a penalty (in an amount up to $5,000), costs, and reasonable attorneys' fees are mandatory. § 610.027.4.

There is no dispute that Defendant is a state agency and is aware of its obligations under the Sunshine Law. And, as Defendant acknowledged in its motion to dismiss and suggestions in support filed with this Court, it is also aware that under binding precedent it is not a law

enforcement agency entitled to invoke the exemption upon which it relied. Like in *Strake*, the Defendant here was aware of its obligations under the Sunshine Law and the binding case precedent, yet it made a conscious decision not to comply with the law's requirements with full awareness of the consequences. Additionally, despite conceding their awareness of the binding legal precedent, Defendant did not utilize § 610.027.6 to initiate its own lawsuit, it instead required Plaintiffs to file this lawsuit in order to obtain the records.

In calculating an appropriate civil penalty, § 610.027.3-.4 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." As to the first factor, Defendant is a statewide agency, so its jurisdiction is large. As to the second factor, the offense is serious: Defendant refused to disclose records despite being aware of the binding precedent addressing whether state agencies without arrest powers are law enforcement agencies and persisted in refusing despite any investigation being inactive. Moreover, if Defendant doubted that the holding in *Scroggins* was correct and wished to set up a test case to challenge it, then Defendant could have initiated an action under § 610.027.6 at its own expense rather than waiting for Plaintiffs to initiate this action. The third factor weighs in favor of a smaller civil penalty because this Court is aware of no record of prior Sunshine Law violations by Defendant. Thus, this Court finds that a civil penalty of $500 is appropriate. The Court also orders the Defendant to pay Plaintiffs' attorney fees and costs.

IT IS THEREFORE ORDERED AND DECREED:

1. Defendant knowingly and purposely violated the Sunshine Law.
2. Defendant must produce all responsive records, if those records have not already been produced.

3. Defendant is ordered to pay a $500 civil penalty to Plaintiffs.

4. Defendant is further ordered to pay Plaintiff's costs ($152.47) and reasonable attorneys' fees ($10,602.50) in the total amount of $10,754.97.[2]

1-15-19

The Honorable Patricia Joyce Date

[2] This amount is based upon the affidavits and supporting documents submitted by Plaintiffs.