

FILED

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI**

SEP - 3 2014

JOAN M. GILMER
CIRCUIT CLERK, ST. LOUIS COUNTY

AMERICAN CIVIL LIBERTIES UNION)
of MISSOURI FOUNDATION, et al.,)
)
Plaintiffs,)
v.)
)
COUNTY OF ST. LOUIS)
)
Defendant,)
and)
)
FEDERAL BUREAU OF INVESTIGATION,)
)
Intervenor.)

Cause No. 14SL-CC02395
Division No. 9
Date: September 3, 2014

FINDINGS OF FACT AND CONCLUSIONS OF LAW

DECLARATION

ORDER AND JUDGMENT

This matter is before the Court on plaintiffs' petition brought pursuant to the Missouri Sunshine Law, Chapter 610 of the Missouri Revised Statutes, to require public disclosure of certain FBI documents (Mueth records) maintained by the County of Saint Louis (St. Louis County). The plaintiffs, American Civil Liberties Union of Missouri Foundation, Inc. and Mustafa A. Abdullah (collectively referred to as the ACLU), were represented by Attorneys Anthony E. Rothert, Grant R. Doty and Gillian R. Wilcox; the defendant County of St. Louis was represented by County Counselor Patricia Redington and Deputy County Counselor Robert H. Grant; and the intervenor Federal Bureau of Investigation (FBI) was represented by Assistant United States Attorney Nicholas P. Llewellyn.

Procedural History

In its petition and other pleadings for a preliminary injunction and a permanent injunction, the ACLU is seeking to obtain a copy of FBI records regarding embezzlement of county funds by Edward Mueth that are in St. Louis County's possession and alleges that St. Louis County's failure to turn the records over to the ACLU is a violation of Missouri's Sunshine Law. The ACLU wants this Court to, among other things, "[e]nter an injunction requiring Defendant to provide Plaintiffs copies of the public records they requested[.]"¹

In its answer to ACLU's petition, St. Louis County stated "that it believes that the need for transparency in County government outweighs any FBI need to keep the requested records confidential[.]" but that it declined to give a copy of the Mueth records to the ACLU because St. Louis County has a good faith belief that the records are exempted from disclosure under § 610.021 (14) RSMo of the Missouri Sunshine Law.

The FBI, in memorandum filed,² stated, inter alia, that the Mueth records should not be disclosed to the ALCU because these records would reveal information that should be protected from disclosure under § 610.021 (14) of the Missouri Sunshine Law and 5 U.S.C. § 552(b)(7)(C) of the Freedom Of Information Act (FOIA).³ Additionally, the FBI stated in its motion to intervene that "[d]isclosure of the written and electronic FBI-

¹ Plaintiffs' motion for a temporary restraining order pursuant to Rule 92.02(a) was denied without prejudice on July 18, 2014.

² FBI memorandum was filed pursuant to Missouri Supreme Court Rule 52.12(C).

³ The FBI also stated that the Mueth records should not be disclosed because: the FBI-generated records should be returned to the FBI; and the law enforcement investigative techniques or sources are protected by a law enforcement investigative privilege. However, this court order does not prevent the FBI from retrieving its records and the evidence submitted does not sufficiently provide a formal claim of the law enforcement investigative privilege. Additionally, in its memorandum filed pursuant to Missouri Supreme Court Rule 52.12(C), it does not appear that the FBI is claiming an exemption under 5 U.S.C. § 552(b)(7)(E), usually referred to as Exemption 7E, which is the FOIA section that protects from disclosure techniques and procedures for law enforcement investigations.

generated material under the Missouri Sunshine Law creates various issues of unwarranted invasions of privacy, as well as disclosure of federal property not in the control of a state and/or local entity.”

Prior to the trial of this matter, the ACLU timely filed a request for opinion and findings of fact, pursuant to Missouri Supreme Court Rule 73.01(c), specifically requesting that this Court “issue an opinion containing a statement of the grounds for its decision and findings of fact on whether Defendant is a ‘public governmental body;’ the records at issue are ‘public’ under Missouri law; and what, if any, statutory exemptions apply to the public record, and the factual basis for any such exemptions.”

The parties, through their respective counsel, agreed to consolidate ACLU’s motion for preliminary injunction with a trial on the merits of the facts of this matter. The parties also submitted pretrial legal briefs and memoranda. A bench trial was held on August 8, 2014, with evidence adduced and the matter was submitted to the Court.

Trial

During the trial of this matter, ACLU submitted two evidentiary exhibits to the Court. The attorneys for St. Louis County and the FBI did not object to these exhibits and they were received by the Court as evidence. ACLU’s first exhibit, *ACLU Exhibit 1*, is a copy of a letter sent by Mustafa Abdullah to St. Louis County that requested a copy of the report prepared by the FBI regarding embezzlement of county funds by Edward Mueth. ACLU’s second exhibit, *ACLU Exhibit 2*, is a copy of a letter sent by County Counselor Patricia Redington to Mustafa Abdullah as a reply to Abdullah’s letter.

Relevant parts of ACLU's exhibits are attached and incorporated by reference into this order and judgment.

Also at trial the parties stipulated to exhibits submitted by St. Louis County and the FBI, and these exhibits were received by the Court as evidence.⁴ In its exhibit, St. Louis County submitted St. Louis County Ordinance No. 24,637 (2011), which relevant parts are attached as *St. Louis County Exhibit A* and incorporated by reference into this order and judgment.

The FBI's exhibit is a declaration by FBI Task Force Officer Joe Clark. This exhibit is also attached as *FBI Exhibit B* and incorporated by reference into this order and judgment.

During the trial, the parties did not present any witnesses for sworn testimony and did not present the Mueth records for this Court's judicial review or in camera inspection. After the parties' exhibits were received into evidence, this matter was submitted to the Court for its ruling.

The Court, being advised in the premises, enters its findings of fact and conclusions of law as follows:

Findings of Fact

On July 2, 2014, Mustafa Abdullah, an ACLU program associate, mailed a letter to the custodian of records of St. Louis County that requested under the Missouri Sunshine Law "stored" or "retained" documents that were provided by or prepared by the FBI in connection with its investigation of Ed Mueth. In a July 7, 2014 reply letter, St.

⁴ ACLU did not object to the admission into evidence St. Louis County's and FBI's exhibits, effectively waiving any objection or request for relief under § 610.023 RSMo.

Louis County Counselor Patricia Redington declined to disclose the Mueth records to Abdullah until such time the FBI authorizes the disclosure. Also, Redington stated that the ACLU may make requests for those records directly to the FBI under the FOIA.

Joe Clark, a task force officer to the St. Louis, Missouri field office of the FBI, stated in a sworn declaration that the Mueth records are spreadsheets that summarize bank records of Mueth's spending of funds from St. Louis County that were prepared with the law enforcement purpose to determine whether there were other persons involved in the crime and whether Mueth purchased any assets which could be forfeited under federal law and returned to St. Louis County. These records also contain the names of innocent third parties who unknowingly received stolen funds from Mueth. Clark further stated that "[a]nyone reviewing these spreadsheets would be able to determine what types of financial transactions and spending patterns are of special interest to the FBI during criminal investigations."

Conclusions of Law

In considering whether St. Louis County should disclose the Mueth records to the ACLU, it must be determined: (1) whether St. Louis County a public governmental body; (2) whether the Mueth records are "public records" under the Missouri Sunshine Law; and (3) whether there is a statutory exemption that allows St. Louis County to not disclose the Mueth records to the ACLU.⁵ See *News-Press & Gazette Co. v. Cathcart*, 974 S.W.2d 576 (Mo. App. W.D. 1998).

⁵ These are the three issues requested in ACLU's Rule 73.01(c) request for findings of fact and conclusions of law.

Public Governmental Body

From the evidence and legal memoranda filed in this matter, it is undisputed that St. Louis County is a public governmental body. The Missouri Sunshine Law defines “public governmental body” as including “any legislative, administrative or governmental entity created by the constitution or statutes of this state[.]” § 610.010 (4) R.S.Mo. St. Louis County was created by statute and is recognized as an “existing county” by the Missouri constitution as a legal subdivision of the state. Mo. Constitution article VI, § 1 (1945). Therefore, as a matter of law, St. Louis County is a public governmental body as defined under Missouri Sunshine Law.

Public Records Under the Sunshine Law

The Mueth records maintained by St. Louis County are “public records” under the Missouri Sunshine Law. The evidence submitted in this matter adequately showed that St. Louis County, a public governmental body, retained, used, and continues to be in possession of the Mueth records that it used for its investigation of Ed Mueth, and thus these records are “public records” under Missouri law.

The Missouri Sunshine Law specifically defines “public record” as “*any record, whether written or electronically stored, retained by or of any public governmental body[.]*” § 610.010 (6) RSMo. The word “retained” is not defined under this law and must be given its ordinary meaning, which is “to hold or continue to hold in possession or use; continue to have, use, recognize, or accept: maintain in one’s keeping” *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 881 (Mo. Banc 1999), citing Webster’s Third New International Dictionary, 1938 (1976).

Under this ordinary meaning of “retained,” it is obviously clear that St. Louis County, a public governmental body, retained, used, and continues to be in possession of the Mueth records such that these records are deemed, as a matter of law, public records under the Missouri Sunshine Law.

The § 610.021 (14) RSMo. Statutory Exemption

§ 610.021 (14) RSMo. of the Missouri Sunshine Law is a statutory exemption that authorizes St. Louis County to close and therefore not disclose parts of the Mueth records to the ACLU, *only to the extent of protecting the identities of third parties against unwarranted invasion of personal privacy.*

The Missouri Sunshine Law exempts from disclosure records that are protected by law. § 610.021 (14) RSMo. of that law states that, “[e]xcept to the extent disclosure is otherwise required by law, a public governmental body is authorized to close . . . records . . . to the extent they relate to . . . (14) [r]ecords which are protected from disclosure by law.” 5 U.S.C. § 552(b)(7)(C) of the FOIA is the “law” that protects the Mueth records from disclosure only to the extent of protecting the identities of third parties against unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(7)(C) protects from disclosure “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy . . .” Under this section, individuals have an obvious privacy interest in not having their personal information disclosed. *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice*, 746 F.3d 1082,

1091 (D.C. Cir. 2014). Also, names and identifying information of third parties are presumptively exempt from disclosure. *Id.*, at 1096, citing *Schrecker v. United States Department of Justice*, 349 F.3d 657, 666 (D.C. Cir. 2003). However, when considering exemptions under this section, courts must balance the privacy interest against the public interest in disclosing *what the government is up to*. *Id.*, at 1091.

The evidence submitted in this case reveals that the Mueth records contain the names of a number of third party individuals that should be exempted from disclosure under 5 U.S.C. § 552(b)(7)(C). Task Force Officer Joe Clark's declaration stated that the records contain "names of a number of third party individuals who received stolen funds from St. Louis County through Mr. Mueth, apparently without knowledge that the funds were stolen." In balancing the interests, the Court finds that the privacy interests of these third party individuals outweigh the public interest in disclosure, and that the information regarding the third parties in the Mueth records are exempted from disclosure under 5 U.S.C. § 552(b)(7)(C) of the FOIA. Any records disclosed to the ACLU must therefore be redacted to exclude the names and identifying information of the third parties mentioned in Officer Clark's Declaration. See § 610.024.1 RSMo.⁶

Declaration

Order and Judgment


ACCORDINGLY, because of the foregoing reasons, the FBI's objection to the ACLU's petition is sustained in part to the extent of disclosure of Mueth records that contain exempted materials of names and identifying information of third party

individuals, and further, the ACLU's petition for injunction is sustained in part to the extent the Mueth records only disclose nonexempt material. Pursuant to § 610.024.1 RSMo., St. Louis County is hereby ordered to redact names and identifying information of third party individuals from the Mueth records and make the nonexempt material in those records available to the ACLU for examination and copying.

Furthermore, the Court declares that St. Louis County acted in good faith and did not purposely, or in the alternative, knowingly, violate the Missouri Sunshine Law. Unless otherwise noted, FBI's objection and ACLU's petition are denied in all other respects.

This 3RD day of September, 2014

SO ORDERED:


Judge DAVID LEE VINCENT III
St. Louis County Circuit Court
Division 9

ACLU, et al., v. County of St. Louis, et al., Cause No. 14SL-CC02395

cc: Attorneys of Record

⁶ This statute states that "[i]f 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.

ACLU Exhibit 1

July 2, 2014

Custodian of Records
Saint Louis County
41 South Central
Clayton, Missouri 63105

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To Whom It May Concern:

This letter is a request under the Missouri Sunshine Law. Pursuant to the provisions of Chapter 610 of the Missouri Revised Statutes, I request that you provide a copy of the following records that have been electronically stored or retained by Saint Louis County:

- 1) The report prepared by the Federal Bureau of Investigation (FBI) regarding embezzlement of county funds by Edward Mueth ("Mueth Report");
- 2) Any and all documents provided by the FBI to Saint Louis County as part of the Mueth Report; and
- 3) Any and all documents regarding distribution of the Mueth Report written, electronically stored, or retained by Saint Louis County or any official or employees of Saint Louis County.

If any or part of this request is denied, please send a letter listing the specific exemptions upon which you rely for each denial and provide the contact information for the official to whom I may appeal. Mo. Rev. Stat. § 610.023.4. This request must be acted upon as soon as possible, but in no event later than the end of the third business day following the date the request is received." Mo. Rev. Stat. § 610.023.3.

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Do not hesitate to contact me with any questions. I appreciate your attention to this matter.

Sincerely,

Mustafa Abdullah
Program Associate

ACLU Exhibit 2

July 7, 2014

Mr. Mustafa Abdullah
American Civil Liberties Union

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Re: Request for records

Dear Mr. Abdulla[h]:

In response to your letter dated July 2nd, I'm enclosing three letters that pertain to distribution of the FBI materials generated by their investigation of the Ed Mueth fraud; I am custodian of only those records kept in this office but am not aware of other documents.

For the reasons noted in those letters, I am not providing documents prepared by the FBI and provided to this office. As such time as the FBI advises that we may release the records, we will do so. Of course, you are free to make a Freedom of Information Act request directly to the FBI if you believe the records should be released.

Please let me know if you have any questions about this matter.

Sincerely,

Patricia Redington
County Counselor

St Louis County Exhibit A

St. Louis County Ordinance No. 24,637 (2011)

114.010 Sunshine Law Policy. - The provisions of this chapter shall apply to all public governmental bodies of St. Louis County Government. It is the policy of St. Louis County that all public meetings, records and votes be open to the public unless closed pursuant to the provisions of Section 114.020.

114.020 Public Meetings, Records and Votes to be Open;

Exceptions. -1. All public records shall be open to the public for inspection and duplication; except , however, that records pertaining to the following subjects shall be closed unless determined otherwise by the relevant governmental body:

.....

(14) Records which are protected from disclosure by law;

(22) Arrest, incident and investigative reports of any federal, state, county or municipal law enforcement agency, except to the extent such records are required to be open under the provisions of Section 610.100 et seq. R.S.Mo[.]

FBI Exhibit B

DECLARATION OF FEDERAL BUREAU OF INVESTIGATION TASK FORCE OFFICER JOE CLARK

1. My name is Joe Clark. I am currently assigned as a task force officer to the St. Louis, Missouri field office of the Federal Bureau of Investigation ("FBI"). I am also a Detective with the St. Louis County Police Department. I have been personally involved with the FBI's investigation of Mr. Edward Mueth and therefore have personal knowledge of the matters discussed in this declaration.

2. When the FBI investigation regarding Mr. Mueth began in late 2013, a primary purpose of the FBI's investigation was to determine if Mr. Mueth had purchased any assets which could be forfeited under federal law and returned to the victim of the crime, namely St. Louis County and its taxpayers. Another important purpose of the FBI investigation was to analyze financial documents to try and determine if there were any other persons involved with improperly obtaining funds from St. Louis County Health Department beyond Mr. Mueth. As part of the criminal investigation, the FBI created two spreadsheets for law enforcement purposes during this criminal investigation of Mr. Mueth's spending of funds obtained from the St. Louis County Health Department. To analyze these issues, the FBI received a large quantity of bank records involving St. Louis County funds and Mr. Mueth's spending from St. Louis County. The St. Louis County had previously obtained these bank records without federal assistance.

3. The FBI then summarized the bank records provided by St. Louis County, and tracked spending, trying to identify valuable assets that were purchased by Mr. Mueth with St. Louis County funds. Two spreadsheets were ultimately prepared. Each spreadsheet contains the names of a number of third party individuals who received stolen funds from St. Louis County through Mr. Mueth, apparently without knowledge that the funds were stolen.

4. The FBI spreadsheets do not analyze who at St. Louis County may have authorized the funds, under what circumstances any St. Louis County funds were authorized, or whether St. Louis County's financial policies and procedures could or should be strengthened or changed. The FBI's spreadsheets do not contain an executive summary, overall findings, or any conclusions or witness interview summaries. Instead, the FBI spreadsheets merely summarized and organized the underlying bank records because the spreadsheets were created primarily for the narrow law enforcement purpose of looking for potential assets to recover through forfeiture. Anyone reviewing these spreadsheets would be able to determine what types of financial transactions and spending patterns are of special interest to the FBI during criminal investigations. Some of the many bank transaction on one of the FBI spreadsheets are "highlighted."

I declare under penalties of perjury that the foregoing is true to the best of my knowledge and belief.

s/ Joe M Clark

Dated 8/1/14