No. ED105782

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

CURTIS FARBER,
Plaintiff-Appellant,

v.

METROPOLITAN POLICE DEPARTMENT OF
THE CITY OF ST. LOUIS,
Defendant-Respondent.

Appeal from the Circuit Court of the City of St. Louis, Missouri
Case No. 1622-CC05285

Appellant's Brief

ANTHONY E. ROTHERT, #44827
JESSIE STEFFAN, #64861
ACLU of Missouri Foundation
906 Olive Street, #1130
St. Louis, Missouri 63101
(314) 652-3114 telephone
(314) 652-3112 facsimile

GILLIAN R. WILCOX, #61278
ACLU of Missouri Foundation
406 West 34th Street, Suite 420
Kansas City, Missouri 64111
(816) 470-9933 telephone
(816) 652-3112 facsimile

Attorneys for Appellant

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Jurisdictional Statement

This is an appeal from the final order and judgment of the Circuit Court of the City of St. Louis entered on July 19, 2017.[1] Notice of Appeal was filed on July 27, 2017.

This case does not involve any issues within the exclusive jurisdiction of the Supreme Court of Missouri. Pursuant to Missouri Constitution, article 5, section 3, the Court of Appeals has jurisdiction over this appeal. The judgment from which the appeal is taken was entered within the territorial jurisdiction of the Eastern District of the Court of Appeals. § 474.050.[2]

---

[1] The trial court first entered an order and judgment on April 4, 2017. LF 65-85. Following a timely motion to amend filed by Farber on May 4, 2017, the trial court entered an amended order and judgment on July 19, 2017. LF 86-89, 91-112.

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

Statement of Facts

On March 18, 2013, Curtis Farber filed citizen complaint with the Defendant, Metropolitan Police Department of the City of St. Louis. Tr. 8-10, 26-27; P's Ex. 1; D's Ex. A. In his complaint, Farber accused several police officers of criminal misconduct surrounding his arrest on July 9, 2011. P's Ex. 1; D's Ex. A. Specifically, Farber alleged that one officer struck him repeatedly while he was in handcuffs, another officer kicked him in the face while he was in handcuffs, and two other officers threatened to falsify evidence against him. P's Ex. 1; D's Ex. A; Tr. 43, 67-68. In a brochure describing the "Citizen Complaint System," the Police Department defines a "complaint" in this context as "an allegation that an employee engaged in, or failed to engage in, a specific action that would violate a policy of the Department and/or violate criminal law." Tr. 12, P's Ex. 2. The brochure further states that, the Internal Affairs Division (IAD) "investigates all complaints involving allegations of serious misconduct, while complaints involving allegations of minor misconduct may be sent to the appropriate Bureau Commander for investigation. All complaints are coordinated, processed, and reviewed by the IAD and the Inspector of Police." P's Ex. 2. Farber believed that a crime had been committed against him by the police officers identified in his complaint. Tr. 13. The role of the IAD is to investigate all allegations of employee misconduct, including allegations of criminal misconduct. Tr. 54, 60-61.

In a letter date June 20, 2013, Farber was informed that his complaint was received by the Department and assigned IAD File Number 13/131. Tr. 13-14, P's Ex. 3. Nearly twenty months later, in a letter dated February 4, 2015, Farber received notice that

his allegations against the officers were "Not Sustained." Tr. 16, D's Ex. I.[3] "Not Sustained" means that "[t]he investigation did not find sufficient evidence to either prove or disprove the allegations in the complaint." Pl's Ex. 2; Tr. 70-71. Farber timely administratively appealed this decision; his appeal was denied in October 2015. Tr. 16.

On November 3, 2015, Farber hand delivered a written Sunshine Law request to the Department seeking a copy of his IAD report 13/131. Tr. 17-18, Pl's Ex. 4, D's Ex. C. In a letter dated November 5, 2015, Farber was notified that his request was received and that the Department would respond the week of November 16, 2015. Tr. 18-19, Pl's Ex. 5.

Farber did not receive any records or any other response from the Department the week of November 16, 2015. Tr. 19. During the next month, Farber spoke with personnel in the legal department at the City of St. Louis approximately ten times to inquire into the status of his request. Tr. 19-20. Farber received conflicting information regarding its status. Tr. 19-20. On March 31, 2016, Farber mailed a follow-up letter to the legal department seeking an update on his request. Tr. 20-21, Pl's Ex. 6. Thereafter, in a letter dated April 6, 2016, Farber was informed that the report he sought was closed pursuant to

[3] Plaintiff's Exhibit I is the full IAD report 13/131 and it was filed under seal with the trial court. *See* Tr. 41-42, 50. This Exhibit was likewise filed under seal with this Court.

§ 84.344.8[4] and § 610.021(13).[5] Tr. 22-24, 42-44; Pl's Ex. 7; D's Ex. E. On June 2, 2016, Farber filed the underlying lawsuit. LF 7-12. On June 10, 2016, the Department mailed a copy of his initial complaint to his attorney. Tr. 25, 29, 56-58; D's Ex. G. Farber has not received any other records related to his request. Tr. 24-25.

A bench trial was held on February 21-22, 2017. Tr. 4, 34. The trial court found that certain portions of the investigative report may be closed pursuant to § 610.021(3) and (13) and other portions are open and must be disclosed. LF 100-03. The trial court also found that the Defendant knowingly violated the Sunshine Law. LF 98, 108. Farber now appeals the trial court's finding closing portions of the investigative report.

---

[4] The letter mistakenly cites the statute the Department relies on as § 84.344.1.8. *See* D's Ex. J; Tr. 84 (testimony of acting city counselor discussing § 84.344.8).

[5] The letter identified the relevant portion of § 84.344.8 as the part stating that, "records prepared for disciplinary purposes shall be confidential, closed records available solely to the civil service commission and those who possess authority to conduct investigations regarding disciplinary matters pursuant to the civil service commission's rules and regulations." The letter identified that the relevant portion of § 610.021(13) as the portion stating that, "'[i]ndividually identifiable personnel records, performance ratings or records pertaining to employees' are considered closed.'"

Point Relied On

I. The trial court erred in finding that any portion of the investigative report (D's Ex. I) may be closed under the Sunshine Law because the trial court incorrectly declared and applied the law, in that a police department's internal investigation into a citizen complaint that alleges criminal conduct is an investigative report and an open record under the Sunshine Law and Farber's complaint alleged criminal conduct.

§ 610.100.1(5)

§ 610.021

Guyer v. City of Kirkwood, 38 S.W.3d 412 (Mo. banc 2011)

Chasnoff v. Mokwa, 466 S.W.3d 571 (Mo. App. E.D. 2015), *transfer denied* (Aug. 18, 2015)

Argument

I. The trial court erred in finding that any portion of the investigative report (D's Ex. I) may be closed under the Sunshine Law because the trial court incorrectly declared and applied the law, in that a police department's internal investigation into a citizen complaint that alleges criminal conduct is an investigative report and an open record under the Sunshine Law and Farber's complaint alleged criminal conduct.

A. Standard of review and preservation of error

In bench-tried cases, an appellate court "will affirm the judgment unless it incorrectly declares or applies the law, is not supported by substantial evidence, or is against the weight of the evidence." *Matter of A.L.R.*, 511 S.W.3d 408, 411–12 (Mo. banc 2017) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). The same standard of review applies in all types of court-tried cases regardless of the burden of proof at trial. *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo. banc 2014) (footnote omitted).

"The interpretation of a statute is a question of law which this Court determines *de novo*." *Matter of A.L.R.*, 511 S.W.3d at 412. The primary goal in statutory interpretation is to discern the intent of the legislature from the language in the statute. *Id.*

Because Farber is claiming that the trial court incorrectly declared or applied the law following a bench trial, he has preserved his claims of error for appellate review by filing a timely notice of appeal after entry of a final judgment.

B. The IAD report 13/131 is an open record that must be disclosed because it is an investigative report.

The Sunshine Law establishes Missouri's "public policy . . . that meetings [and] records . . . of public governmental bodies [are] open to the public unless otherwise provided by law." § 610.011.1. "Chapter 610 embodies Missouri's commitment to open government and is to be construed liberally in favor of open government." *State ex rel. Mo. Local Gov't Ret. Sys. v. Bill*, 935 S.W.2d 659, 664 (Mo. App. W.D. 1996) (citing *Mo. Prot. & Advocacy Servs. 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 v. Williams Commc'n, Inc.*, 85 S.W.3d 29, 32 (Mo. App. W.D. 2002) (citing § 610.011.1; *News-Press & Gazette Co. v. Cathcart*, 974 S.W.2d 576, 578 (Mo. App. W.D. 1998)).

A "public record" is "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). There is no dispute that the report at issue is retained by Defendant or that Defendant is a public governmental body. 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). Additionally, closure of records under the Sunshine Law is always permissive, never mandatory. *See Chasnoff v. Mokwa*, 466 S.W.3d 571, 577 (Mo. App. E.D. 2015), *transfer denied* (Aug. 18, 2015) (noting that the exemptions in § 610.021 are permissive and

"'[n]othing in sections 610.010 to 610.028 shall be construed as to require a public governmental body to hold a closed meeting, record or vote to discuss or act upon any matter'" (quoting § 610.022.4)). Because the Defendant claimed that an exception to the general rule of openness applies, the burden of persuasion shifts to the Defendant. § 610.027.2; *see also Colombo v. Buford*, 935 S.W.2d 690, 693 (Mo. App. W.D. 1996).

Here, in a letter dated April 6, 2016, Farber was informed by the Defendant that the report he sought was closed pursuant to §§ 84.344.8 and 610.021(13).[6] Tr. 22-24, 42-44; Pl's Ex. 7; D's Ex. E. No other law was cited or referenced by Defendant in the written response as justification for nondisclosure. And, while the trial court correctly found that § 84.344.8 does not apply and is not a basis for closing the report, it erred in finding that portions of the investigative report may be closed as a personnel records

[6] The letter identified the relevant portion of § 84.344.8 as the part stating that, "records prepared for disciplinary purposes shall be confidential, closed records available solely to the civil service commission and those who possess authority to conduct investigations regarding disciplinary matters pursuant to the civil service commission's rules and regulations." The letter identified that the relevant portion of § 610.021 (13) as the portion stating that, "'[i]ndividually identifiable personnel records, performance ratings or records pertaining to employees' are considered closed.'"

under § 610.021(3) and (13).[7] LF 97-98, 100, 102-03. Instead, IAD report 13/131 is an investigative report under § 610.100.1(5).

An "investigative report" is "a record, other than an arrest or incident report, prepared by personnel of a law enforcement agency, inquiring into a crime or suspected crime, either in response to an incident report or in response to evidence developed by law enforcement officers in the course of their duties." § 610.100.1(5). The Police Department is a law enforcement agency and it created the IAD report 13/131 in response to Farber's complaint. Tr. 67-68, 73, 75. Farber's complaint alleged criminal activity. P's Ex. 1; D's Ex. A. And, while Defendant has asserted that this particular investigation was conducted to determine if the officers violated department polices, the Department's internal and unilateral decision to categorize the investigation as one focusing on department policies cannot be determinative as to whether the record is an investigative report. What is determinative is the actual allegations in Farber's complaint.

Farber's complaint is an "incident report," as defined under the Sunshine Law, alleging criminal conduct of several police officers. *Guyer v. City of Kirkwood*, 38 S.W.3d 412, 415 (Mo. banc 2011) (noting that, even where the record is unclear as to

---

[7] The trial court also correctly found that St. Louis City Ordinance 61252 is irrelevant. And, while Farber takes the position that the Defendant cannot raise an ordinance as a defense to disclosure that was not included in its initial letter refusing to produce the requested report, he agrees with the trial court's finding that it is irrelevant even if it were properly raised as supporting the Defendant's decision.

whether the complaint alleged criminal conduct, "[c]learly, the original citizen's complaint qualifies as an 'incident report'"); § 610.100.1(4) (defining an "incident report" as "a record of a law enforcement agency consisting of the date, time, specific location, name of the victim and immediate facts and circumstances surrounding the initial report of a crime or incident, including any logs of reported crimes, accidents and complaints maintained by that agency"). And, as *Guyer* states, when a citizen's complaint implicates a police officer in criminal conduct, "it should be presumed that such alleged criminal conduct was the subject of the investigation, and the report generated by the investigation must be disclosed." *Id*. at 415 (emphasis added).[8] "'[I]ncident reports' are open records, and by implication, once the ensuing investigation becomes inactive, 'investigative reports' become open records as well." *Id*. at 414.

---

[8] In *Guyer*, the Court did note that, while "the report generated by the investigation must be disclosed" when the complaint alleges criminal conduct, certain portions of the report "may be redacted under the protections afforded by section 610.100.3, if any are applicable." 38 S.W.3d at 415. Section 610.100.3 provides, in relevant part, that open records retained by law enforcement may be redacted to the extent they contain "information that is reasonably likely to pose a clear and present danger to the safety of any victim, witness, undercover officer, or other person; or jeopardize a criminal investigation … ; or which would disclose techniques, procedures or guidelines for law enforcement investigations or prosecutions …." Defendant has not relied on this section nor did the trial court find that it applied to any portion of the report at issue.

As Defendant admits, Farber's complaint alleged criminal conduct. Tr. 67-68, 73, 75. Specifically, Farber alleged physical abuse by the officers and that they threatened to fabricate evidence in order to press charges against him. P's Ex. 1; D's Ex. A; *see, e.g.*, 18 U.S.C. § 1519 (falsification of evidence), 18 U.S.C. § 242 (depravation of civil rights), § 565.050 (assault, first degree), § 565.054 (assault, third degree), § 565.056 (assault, fourth degree), § 575.100 (tampering with evidence).[9] Here, a complaint clearly alleging criminal conduct was investigated by personnel of a law enforcement agency and a report was produced compiling that investigation. That is the end of the analysis.

And while Defendant may not want to disclose all IAD reports, Farber is not taking the position that it will have to. Not every complaint of misconduct by a police officer implicates a crime (e.g., an allegation of rude or vulgar behavior toward a citizen, physical unfitness for duty, or negligently causing injury), and, therefore, not every investigation into alleged police misconduct by the IAD results in an investigative report that is an open record. What controls are the actual allegations in the complaint and whether the investigation is conducted by personnel of the law enforcement agency.

---

[9] As noted, Farber believed that a crime was committed against him and this was the basis of his complaint. Tr. 13. There is no evidence whatsoever suggesting that Farber was attempting to allege a violation of the police department policies.

Section § 610.100.1(5) does not contain a functional test delineating the subjective purpose for investigating alleged criminal misconduct.[10]

[10] After *Guyer*, the legislature has declined to change the Sunshine Law that would support the position Defendant is advocating. For example, in 2010, a bill proposed amending the Sunshine Law to provide that:

> records and documents of and pertaining to internal investigations by law enforcement agencies into matters of fitness and conduct of law enforcement officers employed by such investigating law enforcement agencies used solely in connection with matters relating to the employment of such law enforcement officers, and records and documents pertaining to any determinations or actions relating to an officer's employment status taken in connection with or following such investigations. Notwithstanding whether the subject matter of or allegations involved in the internal investigation involve criminal conduct on the part of a law enforcement officer, such records shall be considered records authorized to be closed . . . and not incident reports, investigative reports or other documents covered under section 124 610.100, unless such records and documents are used or

Here, Defendant suggests that, at some point before Farber even signed his allegation of criminal misconduct and before obtaining his corroborating evidence or conducting any investigation, some unidentified person within the Department decided that any investigation into Farber's allegations of criminal misconduct would not be an investigation into a possible crime and would, instead, be an investigation into a violation of "department policies that would coincide with those allegations." Tr. 61-63, 68-70.

The Supreme Court, however, predicted such attempts to do an end-run around the Sunshine Law and presciently stated, without equivocation, that when the incident report alleges criminal conduct, it is "presumed that such alleged criminal conduct was the subject of the investigation, and the report generated by the investigation must be

---

> shared by the agency in a criminal investigation by the law enforcement agency involving the officer.

H.B. 1780, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010) (emphasis added) (available at http://www.house.mo.gov/billtracking/bills101/hlrbillspdf/4445L.01I.pdf). The bill did not pass. *Schweich v. Nixon*, 408 S.W.3d 769, 778 (Mo. banc 2013) (court make take judicial notice of a failed bill). The same amendment failed again in 2013. H.B. 492, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013) (available at http://www.house.mo.gov/billtracking/bills131/hlrbillspdf/0258L.01I.pdf). And 2014. H.B. 1466, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014) (available at http://www.house.mo.gov/billtracking/bills141/hlrbillspdf/4855H.01I.pdf). It has not been reintroduced since. Defendant must comply with the existing law.

disclosed." *Guyer*, 38 S.W.3d at 415. The statutory definition of "investigative report" in the Sunshine Law does not provide Defendant the wiggle room it desires to claim law enforcement personnel meant only to investigate potential violations of the department policies when they investigated the alleged crimes. Farber clearly made an "accusation of criminal conduct"; at that point, the investigation into the allegations and any report produced was an investigative report and open under the Sunshine Law. *See id.* Unlike *Guyer*, where "the record on appeal [did] not establish whether the citizen complaint at issue involved an accusation of criminal conduct[,]" the record here is unambiguous. Farber's complaint alleged criminal conduct.

C. The fact that IAD report 13/131 is an investigative report trumps the possibility that it might also qualify as a personnel record subject to permissive nondisclosure.

The Defendant insists that the investigative report is a personnel record which may be closed. This precise issue was addressed in *Guyer* and that holding was later applied to the Police Department in the series of cases surrounding its investigation into allegations that police officers used World Series tickets that had been confiscated as evidence, *see Chasnoff v. Mokwa*, 466 S.W.3d 571 (Mo. App. E.D. 2015), *transfer denied* (Aug. 18, 2015); *Chasnoff v. Mokwa*, 415 S.W.3d 152 (Mo. App. E.D. 2013); *Ishmon v. St. Louis Bd. of Police Comm'rs*, 415 S.W.3d 144 (Mo. App. E.D. 2013); *Chasnoff v. Bd. of Police Comm'rs*, 334 S.W.3d 147 (Mo. App. E.D. 2011)). And, while the trial court attempted to distinguish the *Chasnoff/Ishmon* cases, they are not so distinguishable. *See* LF 105-06. It would appear that the only difference between those cases and the present case is that the

Defendant, after *Chasnoff/Ishmon*, became aware of the Sunshine Law's requirement to disclose IAD reports created in response to complaints of criminal conduct and therefore decided that it could avoid such disclosure by categorizing an investigation as solely disciplinary in nature even when it was the Police Department's only investigation into criminal misconduct.

As *Guyer* points out, the law is clear that "section 610.100.2 overrides section 610.021." 38 S.W.3d at 414. In fact, the trial court here correctly concluded the same when it found the following: "To the extent that there is any conflict between § 610.021 and § 610.100, the latter will control, as it is the more specific provision." LF 100. And, as *Guyer* explained, "[w]here, as here, a specific statute requires disclosure of a specific type of public record, section 610.021 may not be relied on to maintain closure, although it would otherwise apply." 38 S.W.3d 412. Thus, even assuming that the records Farber requested could in some other context also qualify as personnel records, they must still be disclosed because they are part of an investigative report.[11]

As the trial court acknowledged, "[c]ertainly plaintiff's complaint that police officers assaulted him can be considered a report of a crime—i.e., an 'incident report' triggering an investigation, see § 610.100.1(4)[.]" LF 101. The court then erroneously

---

[11] As discussed in greater detail, *infra*, the report at issue cannot be separated into investigative *or* personnel portions, it is an investigative report because the complaint alleged criminal conduct and the report was created as part of the Defendant's investigation into those allegations.

concluded that it "does not follow that an 'investigative report' prepared in conjunction with such a complaint is necessarily an open record in its entirety." LF 101. That is, however, exactly what follows. In reaching its erroneous conclusion, the trial court relied on *Laut v. City of Arnold*, 417 S.W.3d 315 (Mo. App. E.D. 2013). *See* LF 101-02.

However, if a complaint alleges a crime, as both the Defendant and trial court acknowledge the complaint here did, then, under *Guyer*, any investigation into that alleged crime by a law enforcement agency is an open investigative report that must be disclosed under the Sunshine Law. *Guyer* controls, and any reliance on dicta from *Laut* is misplaced and should not support a finding that, despite the clear allegation of a crime in a citizen complaint, the police department can avoid disclosing a report by simply choosing not to treat a complaint as an alleged crime and, instead, treating it as an investigation into whether the police officers violated department policies. *See* LF 102.

Laut is not dispositive because it did not decide the issue presented here; instead, that case was remanded to the trial court. In *Laut*, this Court discussed the relevant law in dicta but ultimately found that summary judgment was improper on the record because "a genuine factual dispute exists regarding whether an Internal Affairs report prepared by the City is exempt from disclosure under the Sunshine Law." 417 S.W.3d at 317. Like this case, the appellants in *Laut* argued that "the information they sought was not closed information because the underlying conduct was criminal in nature, and the Sunshine Law requires disclosure of records regarding criminal investigations." *Id.* at 318. However, there, without viewing any of the requested documents, the trial court found they were exempt from disclosure pursuant to § 610.021(3) and (13). *Id.* at 318. Here,

while the trial court did view the requested report, it erroneously concluded that portions of it could still be closed.

Citing *Guyer*, this Court concluded in *Laut* that, because some records must be disclosed under the law even if they could be closed under § 610.021, "the threshold question for determining whether a document may be exempt from disclosure is first, whether disclosure of that document is otherwise required by law." 417 S.W.3d at 319. This Court then "affirm[ed] the trial court's summary judgment as it relates to any public records other than investigative reports, containing only information responsive to Appellant's requests for the reasons for discipline of [the police department employees]." *Id.* at 321 (emphasis added). With regard to the Internal Affairs report at issue that, like here, the appellants argued was an investigative report and therefore subject to disclosure, this Court found "a genuine factual dispute exists as to the nature of the Internal Affairs report, which precluded summary judgment regarding whether this report must be disclosed." *Id.* And, as this Court acknowledged, "[t]he key aspect of an investigative report is that it is 'directed to alleged criminal conduct.'" *Id.* (quoting *Guyer*, 38 S.W.3d at 415).

The trial court has mistakenly relied on dicta in *Laut* to reach an erroneous legal conclusion. In *Laut*, this Court—noting that its opinion "may seem at first look to contradict *Guyer*"—opined that, "to the extent an internal police report, or portions thereof, can equally be considered *both* a personnel record and an investigative report, it, or those portions, should be disclosed." *Id.* at 323. And, while *Laut* took the position that, "if the document can be separated into portions that qualify as one *or* the other, then any

portion that can be considered exempt under Section 610.021, subsections 3 and 13 pertinent herein, and not part of the criminal investigation, may be withheld under Section 610.024[,]" it also acknowledged the holding in *Guyer* that, "where a document 'fits equally' under an exemption and a provision requiring disclosure, the document should be disclosed, notwithstanding the fact that an exemption would otherwise apply." *Id.* (quoting *Guyer*, 38 S.W.3d at 414).[12]

---

[12] In a footnote, while acknowledging that "this distinction may prove difficult to apply," this Court opined that it was the appropriate resolution "because any citizen complaint against a police officer contained in an internal affairs report can involve an alleged criminal offense, as literally any complaint can be simultaneously labeled a criminal violation of the complainant's civil rights under federal law." *Laut*, 417 S.W.3d at 323 n.9. As noted, *supra*, citizen complaints do not necessarily allege criminal conduct as they might instead allege rude behavior or negligence. Thus, it is not the case that "literally any complaint" could be labeled a criminal violation. *See United States v. Johnstone*, 107 F.3d 200, 210 (3d Cir. 1997) (noting that, "to convict a defendant under [18 U.S.C.] § 242, the government must show that the defendant had the particular purpose of violating a protected right made definite by rule of law or recklessly disregarded the risk that he would violate such a right"); *United States v. Giordano*, 260 F. Supp. 2d 477, 483 (D. Conn. 2002) ("In order to convict the Defendant under [18 U.S.C. § 242], the Government must prove: (1) that on or about the date alleged, the Defendant acted under color of law; (2) that the conduct of the Defendant deprived the

Here, the trial court, relying on dicta in *Laut* and ignoring the clear directive from *Guyer*, erroneously allowed a police department to withhold portions of an investigative report into allegations of criminal misconduct based upon the department's internal categorization of the investigation as disciplinary instead of criminal. However, the report cannot be so easily separated and the trial court's holding cannot be squared with *Guyer*. Whatever this Court's intentions were when *Laut* was decided, it is a misinterpretation of the law to allow the result reached by the trial court here.

A police department is not permitted to categorize a criminal complaint as one that alleges a violation of department policies in order to withhold the report from the public's view. If a complaint alleges criminal conduct, the investigation into that complaint is criminal and the report is an open record. That is the end of the inquiry. In such a case, where the complaint alleges criminal conduct, the final report investigating those allegations cannot be parsed into both personnel records and investigative reports, the entire file is an investigative report and an open record.

And while it is true—as the trial court noted—"[t]he Sunshine Law does not dictate to police departments what complaints must be handled as criminal complaints, as

---

victim of a right secured or protected by the United States Constitution …; (3) that the Defendant acted willfully; and (4) that the Defendant's acts resulted in bodily injury to the victim." (Citing *United States v. Lanier,* 520 U.S. 259, 264 (1997))). Criminal conduct is either alleged or it is not.

employee misconduct complaints, or as both[,]" it is the complaint itself that will be determinative. LF 102. And, even though a police officer's conduct may well violate criminal law *and* a department policy, that alone does not change the fact that an investigation by law enforcement personnel into a complaint alleging criminal conduct is criminal in nature and produces an investigative report.

Here, the presumption in *Guyer* is not overcome simply by the police department choosing to categorize a criminal complaint as disciplinary, particularly when it was the only investigation conducted into the alleged criminal misconduct. What the Court found in *Guyer* was that, if a "citizen complaint implicate[s] … any criminal conduct … it should be presumed that such alleged criminal conduct was the subject of the investigation, and the report generated by the investigation must be disclosed." 38 S.W.3d at 415. To the extent *Laut* suggests something else, it is mistaken and should not be followed. Here, there is no dispute that Farber's complaint alleged criminal conduct; therefore, IAD report 13/131 is an investigative report and must be disclosed under the Sunshine Law.

Conclusion

The trial court erred in finding that any portion of IAD report 13/131 could be closed under § 610.021(3) and (13). Farber's complaint alleged criminal conduct by the police officers and the investigation following such a complaint is criminal in nature. Therefore, the report generated is an investigative report and is an open record under the Sunshine Law. The trial court's decision should be reversed to the extent that it found any portion of the investigative report can be closed under § 610.021(3) and (13).

Respectfully submitted,

/s/ Anthony E. Rothert
Anthony E. Rothert, #44827
Jessie Steffan, #64861
ACLU of Missouri Foundation
906 Olive Street, #1130
St. Louis, Missouri 63101
(314) 652-3114
arothert@aclu-mo.org
jsteffan@aclu-mo.org

Gillian R. Wilcox, #61278
ACLU of Missouri Foundation
406 West 34th Street, Suite 420
Kansas City, Missouri 64111
(816) 470-9933
gwilcox@aclu-mo.org

Certificate of Service and Compliance

The undersigned hereby certifies that on December 13, 2017, the foregoing brief was filed electronically and served automatically on counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06 and Local Rule 360; (3) contains 4,977 words, as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus free.

/s/ Anthony E. Rothert