GROSS V. PARSON: MISSOURI SUPREME COURT ISSUES IMPORTANT GUIDANCE ON SUNSHINE LAW REQUESTS.

Every year Missouri's courts decide several cases regarding Chapter 610 of the Revised Statutes of Missouri, the Sunshine Law. Most are concerning minor points. However this year the Missouri Supreme Court issued a decision that can be said to be truly significant. It is important both for what the Court said and for what the Court didn't say. It is one of the rare cases where the Court was forced to look at the very fundamentals of the Sunshine Law.

The case is called *Gross v. Parson* and it was decided on June 29th, 2021.[1] The case involves a 54 part request for records made by Elad Gross seeking records regarding communications between the former Governor, Eric Greitens, and numerous individuals including former political associates of Governor Greitens as well as attorneys of the Governor's Office. Like many similar requests, Mr. Gross asked that the records be provided in electronic form if possible and requested that the State waive its fees. The Governor's office responded first with a letter saying that it would take at least a month to gather the records. Later the Governor's Office sent a second letter saying that there were more than 13,000 responsive documents, that it would take another 120 days to fulfill the request, and included an invoice for $3,618.40.[2] The invoice included approximately 90 hours of "research time" billed at $40.00 per hour.

Mr. Gross responded with a second request for records, these in regard to the Governor's Office's response to and plans to respond to his first request. Again he requested a waiver of fees. Eventually, the Governor's Office responded to the second request and waived the fees. Mr. Gross filed suit in regard to the first request.

Mr. Gross lost his case in the Circuit Court of Cole County and he appealed to the Western District Court of Appeals. The Court of Appeals ruled largely in favor of Gross, and both sides ended up appealing to the Missouri Supreme Court. Part of the ruling at the Court of Appeals was that for records stored electronically, there could be no charges for researching the records. It is clear from the statutes that there cannot be any copying fees for electronic records, however, most public bodies still charge for the costs of finding those records. The Western District focused on the two subparts of § 610.026.1 RSMo, which governs the fees for producing records. Section 610.026.1(1) says "**Research time** required for fulfilling records requests may be charged at the actual cost of research time."(emphasis added) Section 610.026.1(2) says "Fees for providing access to public records maintained on computer facilities … shall include only the cost of copies, [and] **staff time**" (emphasis added). By emphasizing the differences between the terms 'staff time' and 'research time' the Western District concluded that attorneys' fees could properly be charged for requests for paper records, but not for requests for electronic records. Perhaps more importantly, the Western District seemed to say that a public body could charge for the costs to find paper records, but not for electronic records.

Several issues were presented to the Supreme Court. The most talked about was the issue of Attorney fees. The Supreme Court took a different approach than the Western District had. The Court pointed out that the Sunshine Law requires public bodies to separate open and closed portions of records.[3] The Court then reasoned that if the public body already had a duty to separate open and closed materials, the body could not charge for the body's costs in doing so. This would include the costs of an attorney to determine what was open and what was closed. Therefore "Because the Sunshine Law obligates a public governmental body to separate exempt and non-exempt material without regard to any particular records request, attorney review time to determine whether responsive documents contain privileged information is not "[r]esearch time required for fulfilling records requests."[4]

Prior to the *Gross* case, the issue of whether a city could charge for attorney review time was unclear. The only reported case on the subject found that when an outside attorney billed the city for review of records to be released, that bill was chargeable to the requestor.[5] The practical effect of the *Gross* decision is to resolve this dispute, unfortunately against cities. While charging for attorney fees has been a common practice, cities need to be aware that that practice can no longer continue.

In addition, the Court discussed Mr. Gross's complaint that the Governor's office failed to provide a detailed description as to why the records were not immediately available. The response was very similar to what many cities may have said in the past "that providing the documents would take at least 120 business days to complete." The Sunshine Law requires that " 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 earliest time and date that the record will be available for inspection." The Court concluded that since the response did not give any explanation as to why it would take 120 days, that response violated the Sunshine Law. This was so even if the large volume of records might make it obvious why it would take a long time.

As a result, custodians of record will need to be more careful in their initial response to records requests. If the records are not going to be immediately available, it will no longer be sufficient to just say "the records are not immediately available." Rather the response will need to be framed as something like "the records are not immediately available **because** …" followed by a statement of the reasons. Fortunately, there is no limitation as to the reasons, so lack of time remains a valid justification.

Cities are also fortunate that by deciding the case the way they did, the Supreme Court did not have to address the distinctions between § 610.026.1(1) and § 610.026.1(2). Thus it appears for now at least that research time, that is the time it takes to find the records, remains a viable charge regardless of whether it is a paper record or an electronic record. It is likely that this was done to avoid Hancock Amendment implications if public bodies could no longer charge for these costs.

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[1] *Gross v. Parson*, No. SC98619, 2021 Mo. LEXIS 226, 2021 WL 2668318 (June 29, 2021).
[2] *Gross* at 4.
[3] § 610.024.1 RSMo.
[4] *Gross* at 17.
[5] *White v. City of Ladue*, 422 S.W.3d 439 (Mo. App. E.D. 2013).