SC101018

IN THE SUPREME COURT OF MISSOURI

Phillip Weeks,

Appellant,

v.

City of Saint Louis,

Respondent.

Eastern District Court of Appeals Case No. ED112624

City of St. Louis Circuit Court Case No. 1922-CC11987

BRIEF OF AMICUS CURIAE THE MISSOURI PRESS ASSOCIATION IN SUPPORT OF THE APPELLANT

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INTRODUCTORY STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae The Missouri Press Association represents slightly over 200 newspapers and news organizations, both print and digital, throughout Missouri. The organization was formed in 1867 for the purpose of furthering efficiency and morality in the newspaper field, promoting and strengthening the journalism profession, and to enhance the profession of journalism within our state.

The Association itself was incorporated in 1922 as a not-for-profit corporation. Since inception, the Association has acted to educate in regard to matters relating to journalistic issues in Missouri, in furtherance of its goals. Its members request public records from public bodies on a regular basis as they strive to provide news regarding local and state government bodies and public officials. They depend on the records of these bodies to uncover news and accurately report the workings of government.

As part of obtaining open records, Association members routinely submit Sunshine requests for records and work with local officials to secure responsive documents. The process frequently involves clarification and dialogue between journalist and custodian – but the process often works to the satisfaction of all parties and the public that benefits from the news.

Appellant in this case asked for a database retained by a public body. The Sunshine Law, in two different places, required that the Respondent provide the database. The Appellant's attempts to clarify and to request a preferred electronic format do not relieve the public body from its obligation to provide the database.

Dialogue between a requester and a public official about the request should be fostered. However, to hold that a subsequent attempt at clarification or expression of preference for a file type can convert a records request into a demand for creation of a new document would deter dialogue between the parties.

Conversion from one file type to another file type should not be considered the creation of a "new" document. This simple kind of conversion is not what Missouri Sunshine Law jurisprudence contemplates when it holds that public bodies do not need to create a new document to respond to a Sunshine Request. As a practical matter, any time a public body responds to a records request with a PDF file instead of the file's native format (i.e., a Microsoft Exchange email or a Word document), a new file is created.

Finally, to require the requester of public records to guess correctly the format of any given electronically stored file or database would place a lofty burden on the requester, who likely lacks technical expertise and insider knowledge as to the file format in which a public body chose to maintain a particular file.

This Amicus believes these issues need to be clearly presented and argued to the Court from the public's perspective and, for that reason, it seeks to provide the information contained in this brief for the Court's consideration.

ARGUMENT OF AMICUS CURIAE

I. Section 610.011 declares the public policy of Missouri that records of public governmental bodies be open to the public unless otherwise provided by law; no other provision of law forbids disclosure of the requested database.

The Missouri Sunshine Law establishes at its onset that the public policy of Missouri strongly favors open and available records, mandating that the Sunshine Law's provisions "shall be liberally construed and their exceptions strictly construed to promote this public policy." § 610.011.1. Under the Sunshine Law, public records are by default open: "[A]ll public records of public governmental bodies shall be open to the public for inspection and copying …" § 610.011.2.

The database sought by Appellant is a public record. *See Weeks v. St. Louis County*, 696 S.W.3d 333, 338 (Mo. banc 2024); §§ 610.010(6), 610.021, 610.022.5. The public policy of Missouri requires that the Sunshine Law's provision be liberally construed in favor of disclosure of this database.

Two subsections of the Sunshine Law address production of records and both require production of the database requested in this case. The law mandates that "[e]ach public governmental body shall make available for inspection and copying by the public of that body's records." § 610.023.2. Another subsection, addressing electronically stored records, requires that "if the public governmental body keeps a record on a system capable of allowing the copying of electronic documents into other electronic documents, the public governmental body shall provide data to the public in such electronic format, if requested." § 610.029.1.

Liberally construed, both of these provisions required the City of St. Louis to provide the database Appellant requested. Crucially, Section 610.029.1 imposes no requirement for the requestor to specify a format, other than an "electronic format." The unambiguous language of § 610.029.1, coupled with liberal construction of the statute as a whole, leads to the conclusion that the statute makes no demand on the requestor to deduce and identify the correct file type. Moreover, § 610.029.1 contemplates "the copying of

electronic documents into other electronic documents…" Again, liberally construing this statute, this suggests that copying the electronic document in this case—a database—into another file type, is required if requested.

The lower courts in this matter misapplied the law when they relied upon a Sunshine Law provision that permits, *but does not require*, a requestor to specify the format of the records she is to receive: "If records are requested in a certain format, the public body shall provide the records in the requested format, if such format is available." § 610.023.3. First, nothing in the plain language of § 610.023.3 operates as an *exception* that relieves a public body of producing records in the format it does have, if the format is different from what the requestor specified. Even if it were an exception akin to the litany of exceptions provided in § 610.021, it would have to be strictly construed. § 610.011.1.

Second, because § 610.023.3 is plainly not an exception to disclosure, it must be liberally construed in favor of disclosure. § 610.011.1.

Third, the doctrine of *in pari materia* requires that "statutes relating to the same subject matter should be construed to achieve a harmonious interpretation." *State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 605 (Mo. 2019) (internal citations omitted). Given that the Sunshine Law mandates disclosure of records (§ 610.023.2) and also mandates disclosure of electronically held records without regard to format (§ 610.029.1), the only harmonious interpretation of § 610.023.3 is to interpret is an option that inures to the benefit of the requestor and not as a limitation upon her. In short, § 610.023.3 can only be read to give a requestor the chance to specify a particular format for the record production; if that format is not available or unfeasible, the public body must still produce the records in the format in which they are maintained.

Such an interpretation is in keeping with the Sunshine Law's purpose and Missouri's public policy. It produces a result that enables newsgathering and coverage, rather than obstructing those important endeavors.

II. Converting files should not be considered the creation of a new document.

As a practical matter, newspapers make many Sunshine requests of the public bodies they cover; often the requests are so routine that the public bodies volunteer the documents without a request, such as in the material provided to reporters alongside meeting agendas. But in modern times, all of these documents are frequently transmitted to reporters not as hard paper copies, but as PDF files. In every single instance of a public body producing a PDF file of Word document, or an email, or presentation, the public body has, in a hyper technical sense, created a new document with a new file format. But this is not the kind of creation of a new document requiring intellectual input from the public body that has been found to be beyond the purview of the Sunshine Law.

In *American Family Mutual Insurance Company v. Missouri Department of Insurance*, 169 S.W.3d 905 (Mo. App. 2005), the Court of Appeals held that a public body did not have to generate new data or perform analysis of data in response to a Sunshine request. In *Jones v. Jackson County Circuit Court*, 162 S.W.3d 53 (Mo. App. 2005), the Court of Appeals held that a public body was not required to produce a new electronic document of information culled from other electronic documents. In both of those cases, the public body was called upon by the requestor to conduct analysis, cull information and essentially create a body of information in a new document. These cases are distinguishable from the present matter, in which the Appellant merely asked for a database, suggesting that the excel format would be his preference. As the concurring opinion stated in *Weeks v. St. Louis County*, "[e]xtracting existing data into a useable electronic format is not the creation of a new record. Holding otherwise essentially prohibits access to public records maintained in a public governmental body's database." 696 S.W.3d at 347.

Conversion of one file type into another file type is nothing more than a form of mandated copying. *See* § 610.026 ("[E]ach public governmental body shall provide access to, and, upon request, furnish copies of public records."); *see also* § 610.029.1.

III. Attempts at clarification should be fostered.

In this case the Appellant, in an apparent attempt to help the City of St. Louis fulfill its obligation under the Sunshine Law, engaged in a dialogue with the public body in which he expressed a preference for Excel files as an illustration of the kind of data he was seeking. It is in the interest of the pubic body and in the interest of seekers of public documents, such as news reporters, to be able to engage in necessary dialogue so that the parties can comprehend the request. In this case, the Appellant's attempt to suggest a file type has been contorted in a reason to deny his request. Such a precedent will have a deleterious effect on newsgathering and on public bodies, as reporters will now be reluctant to clarify or will feel obliged to make numerous Sunshine requests instead of one.

IV. Record-seekers should not be forced to guess the right file type.

In the story of Ali Baba, the hero speaks the phrase "Open Sesame" and the cave door swings open, revealing a fortune. Ali Baba, though, had a brother, named Cassim, who guessed at another phrase, "Open Barley." The door did not swing open, and Cassim met a grim fate.

As one court notes, open records requests "are not a game of Battleship: the requester should not have to score a direct hit on the records sought based on the precise phrasing of his request." *Shteynlyuger v. Centers for Medicare and Medicaid Services*, 698 F.Supp.3d 82, 112 (D.D.C. 2023) (internal quotation omitted); *see also Kensington Research & Recovery v. U.S. Dept. of Housing*, 620 F.Supp.2d 908, 913 (N.D. Ill. 2009) ("Although HUD did not save the data in the precise format [requested], the *de minimis* outlay of time, energy, and resources required to recreate a . . . form that previously existed does not constitute creation of a new record."); *Schladetsch v. U.S. Dep't of HUD,* No. 99–0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000) (agency required to produce electronically-stored information in disparate databases, even where the data has never been compiled in the manner requested, because "extracting and compiling the data does not amount to the creation of a new record"); *Department of Corrections v. St. Hilaire*, 128

A.3d 859, 864 (Pa. Commw. 2015) (request did not require department of corrections to "guess" just because it was broad enough to encompass unavailable information).

Reporters and other members of the public will not normally know the file types used by a public body in maintaining a particular electronic record. The types of files are multifarious and evolving. A reporter should be able to request a particular file, even suggest a file format, and the public body should be made to honor the request and provide the file in the format requested if possible, but in any event, in whatever file format proves feasible. That approach is consistent with the Sunshine Law and the state's public policy. To hold otherwise would force reporters into an unnecessary guessing game where the purpose of the Sunshine Law is frustrated at random.

Respectfully Submitted,

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Certification Pursuant to Rule 84.06(c)

I hereby verify, pursuant to Rule 55.03, that I signed the original of this electronic filing. I further certify that the foregoing Brief of Amicus Curiae The Missouri Press Association complies with the limitations contained in Rule 84.06(b) and that it contains 2261 words.

Respectfully Submitted,

s/ *Dan Curry*

Counsel for the Amicus Curiae
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Certification of Consent

I hereby verify and attest that all parties to this appeal have consented to the filing of this brief.

Respectfully Submitted,

s/ *Dan Curry*
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