IN THE CIRCUIT COURT OF COLE COUNTY MISSOURI
NINETEENTH JUDICIAL CIRCUIT

BEN SANSONE, on behalf of)
THE SUNSHINE PROJECT)
)
Plaintiff,)
v.) 17AC-CC00635
)
ERIC GREITENS,) Div. 1
Governor of Missouri, et al.,)
)
Defendants.)

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

We have before us a simple but profound bipartisan issue, the Sunshine law and government transparency generally, an issue that brings all political parties together and animates residents of Missouri. Defendants filed a Motion to Dismiss demonstrating the great length some public officials go through to maintain secrecy and avoid responsibility for violating the law. Defendants claim that, in Missouri, a governor and his inner circle can destroy communications about public business and then *use their record destruction to vex Plaintiff by then claiming they don't "retain" the records they destroyed* and therefore, according to Defendants, Missouri residents can't bring either a Sunshine claim or Chapter 109 claim. Defendant's argument is best described as Kafkaesque, particularly when the argument is promulgated by the State. Shred early and often, say Defendants, because Missourians don't have standing to bring a Sunshine claim if the Custodian no longer possesses the records. Setting aside the propriety of the State of Missouri, by and through the Office of Governor, asserting such an abhorrent argument, Defendants are wrong.

Call it a political affair, but also according to the Defendants, the Governor and Office of Governor can destroy whatever public documents they want, without ramification, so long as the

Office of Governor is fortunate enough to have an Attorney General Office ("AGO") willing to look the other way. Defendants claim only the AGO can enforce the law when the Governor's Office destroys public records that should have been retained. Defendants' legal arguments are not just abhorrent to Missouri law, public policy, and Missouri's efforts to aspire to a more transparent government, but Defendants arguments present an existential threat to Missouri's entire document retention and Sunshine regime.[1]

Defendant cannot seek safety under the tattered blanket of an AGO inquiry that caused the entire State of Missouri to collectively roll their eyes. To his benefit, the Attorney general openly lamented his lack of subpoena power and his inability to compel witnesses to testify, including the Governor. So it's awkward, to say the least, that the same governor, who refused an interview with the AGO, and asserted executive privilege on behalf of his staff, now asks this Court to endorse the AGO's so-called findings related to a handful of staff members, findings that specifically exclude the Governor. Not only is the AGO report and any so-called "fact finding", far outside the scope of the pleadings and inappropriate for a Motion to Dismiss, especially regarding the type of communications deleted. Though the other branches of government may attempt to weigh in, this Court is the only arbiter of the law and the facts.

STANDARD OF REVIEW

A Motion to Dismiss for failure to state a cause of action is solely a test of the adequacy of plaintiff's Petition. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. 1993). A court considering such a Motion must assume as true all allegations in Plaintiff's Petition. *Arnold v. Erkmann*, 934 S.W.2d 621, 625-26 (Mo.App.1996). Further, those facts must be viewed in the

[1] Wisconsin's tried to change the meaning of "transitory", then after public record scandals and outcry, changed it back. See *"Wisconsin's Public Records Board scraps transitory records changes*, Jan. 11, 2017, http://host.madison.com/ct/news/local/wisconsin-s-public-records-board-scraps-transitory-records-changes/article_11c707c8-78a7-5a15-bd32-c9cc9a4ec63f.html

light most favorable to plaintiff. Id. No attempt is made to weigh any facts alleged. *Nazeri*, 860 S.W.2d at 306. Dismissal for failure to state a claim is not warranted "unless it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Goe v. City of Mexico*, 64 S.W.3d 836, 839-40 (Mo.App. E.D.2001). A Petition is sufficient if it "invokes substantive principals of law entitling plaintiff to relief and alleges ultimate facts informing defendant of that which plaintiff will attempt to establish at trial." *Grewell v. State Farm Mut. Auto. Ins. Co., Inc.,* 102 S.W.3d 33, 36 (Mo. 2003). A Petition should not be dismissed for mere lack of definiteness or certainty or because of informality in the statement of an essential fact. Id. See also*, Eilers v. Kodner Development Corp*., 513 S.W.2d 663, 666 (Mo.App. 1974) (rejecting the argument that "magic words" are necessary to state a cause of action).

Defendants destroyed or attempted to destroy public records that should have been retained pursuant to Chapter 610 and Chapter 109

Plaintiff has properly alleged that Defendants attempted to destroy communication, that access has been denied to the records that are still retained, and alternatively, that Defendants destroyed original public records permanently, *both* of which are violation of *both Chapter 109 and Chapter 610* Sunshine Law. Plaintiff's allegations are sufficient to deny Defendant's Motion to Dismiss across the board on allegations made under Chapter 109 and Chapter 610. Even if Defendants succeeded in permanently destroying all the communications in their possession, Defendants cannot claim that they destroyed all of the copies of these public records in the hands of third parties. Whether or not third parties posses copies is a question of fact which must be presumed at the motion to dismiss stage.

Pursuant to Chapter 610, A ***"public record"*** is defined ***as:***

> "**any record, whether written or electronically stored, retained by or of any governmental body, including…records created or maintained by private contractors…on behalf of a public governmental body**" **RSMo §610.010(6).**

The definition of ***"public record"*** and the ability to maintain a claim under Chapter 610 doesn't turn on the word "retention", as Defendants claim. First, the law is deliberately written in an exceedingly liberal manner, in that "***any record, whether…".*** "Any record" is a maximumly broad term in any statute, especially in a statute that is also separately demands liberal construction of the law as Missouri public policy 610.011. ***"Whether"*** is a conjunction that indicates an impending *choice of alternatives*. ***"Whether"*** doesn't even indicate that the choice of alternatives is exclusive so liberally is this provision written. In this case, the choice of alternatives following "***whether"*** includes "***any record"*** that is: ***1) written 2) electronically stored, 3) retained by the government, 4) record of the government but retained by third parties 5) records created by third parties 6) records maintained by third parties.***

Upon receiving a Sunshine request, the Defendants had a legal duty to include in their search for responsive documents: ***paper, electronic storage and third parties***. The communications primarily at issue, sent and received using Confide, were ***1) written, 2) electronically stored, 3) retained and 4) maintained by third parties***. Confide software is both a *record creator* and *arguably, but not certainly, a record destroyer*. When Defendants typed a Confide communication into their phones, they were *1) creating records, 2) retaining those records at that moment, 3) retaining those records even longer in local and third party electronic storage, 4) controlling the transmission of those records and 5) deciding who has access and who*

does not. When Defendants sent Confide communications, created and for some time retained on their phone, Defendants then attempted to destroy that record. The Sunshine Law also makes provisions for records that were "stored" or "retained" at any time. In *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 881 (Mo. banc 1999), the court ruled that although video tape might be reused, the tape is still retained by the Sheriff, and a videotape retained for four-and-a-half days is a record. *Id.* Similarly, the memory on Defendant's phones might be reused after sending a communication but like the video tape in *Hemeyer*, which held or still holds the communication, Defendants phone continued to be retained. ***Plaintiff is alleging that Defendants retain public records on their phones, computers, and with third parties and they have denied access to Plaintiff***.

Defendants created, retained, and controlled those public records. If they made a choice to attempt to destroy them, then that's worse for them, not better. Defendants are not benefitted under the Sunshine law because they attempted to permanently destroy public records. See § 610.023(2) prohibiting the destruction of original records. Moreover, ***the communications were "maintained" and/or "stored" by the private contractor, Confide Inc***., of New York pursuant to §610.010(6) and Defendants had a duty to seek the records from their licensed vendor. Defendant Custodian of Records made no attempt to recover these communications from Confide, Inc., so as to provide access to the Plaintiff or to prove the communications were not the type that must be retained pursuant to either Chapter 109 or 610. Defendants definitely didn't try to vindicate themselves by attempting to recover the deleted data. Even if the Defendant were able prove at the summary judgment stage, which they have not proven yet, that no Confide communications are ***recoverable or maintained by any third-party persons or companies***, Defendants still wouldn't prevail on Plaintiff's Sunshine claims because then, the corollary will will be proven, that ***Defendants removed or destroyed original public records in violation of 610.023(2) RSMo***.

Defendants need to soon realize that once you destroy public records you should have retained, there's no escaping either the Sunshine Law or Chapter 109 private action.

Removal or Destruction of Original Public Records is actionable under Chapter 610

If the court has any question remaining as to whether first or third party "retention" is required to bring a Sunshine claim:

> ***"No person shall remove original public records from the office of a public governmental body or its custodian without written permission of the designated Custodian." -*** § 610.023(2).

The Missouri legislature clearly anticipated exactly this situation. A public official removes, shreds or deletes a record so that a resident cannot access the record. Every Confide communication sent or received by Defendants touching on public business was an ***original public record*** of the Office of Governor. If Defendants deleted the communications by choosing to use software that automatically destroys the communication, then the original was removed without written permission of the Custodian in violation of the Sunshine law. §610.023(2) dispenses with the notion that a Plaintiff cannot maintain any type of Sunshine lawsuit if the Custodian doesn't "retain" the records. Defendant's retention argument was always a stretch considering the liberal definition of "public records" in §610.010(6) that goes far beyond simple first party "government retention", but the "retention" argument as disposing all Sunshine claims is impossible in light of §610.023(2).

A Plaintiff can sustain a cause of action pursuant to the Sunshine Law if the government refuses access to ***"any record"*** that is either ***1) written 2) electronically stored, 3) retained by the government, 4) record of the government but retained by third parties 5) records created by***

third parties 6) records maintained by third parties, or 7) if the government denies access because a person <u>removed or deleted</u> the original records. §610.010(6) and §610.023(2).

The Missouri legislature obviously considered ***the intervention of wrongdoers***, including insiders and government officials when passing the Sunshine Law. Defendants are wrong that the interplay between Chapter 109 and Chapter 610 rewards the public officials who delete original records. Plaintiff has clearly and appropriately made the allegations of Defendant's removal and deletion of public records throughout his petition. Plaintiff has also pleaded in the alternative, as he can do. ***Defendants have denied access*** to the Confide communications either because ***their search for the records is incomplete, improper and didn't include third parties pursuant to §610.010(6) or, because a person removed or destroyed the original communications pursuant to §610.123(2)***. Either way, Defendants Motion to Dismiss must be denied for every Sunshine Law allegation relating to the use of Confide, so that Plaintiff can undertake an effort in discovery to properly search for the communications from third parties and otherwise reinstate the removed and/or deleted public records to the Custodian of Records, while also endeavoring to prove through witness testimony that the communications were the type of public records that should have been retained pursuant to law.

It should be noted now that Defendants made an affirmative decision to authorize a third-party contractor, Confide Inc., to process, send, store, and otherwise maintain Defendant's communications on Confide servers. Defendants decided, when they agreed to Confide's Terms of Service, to allow Confide to share Defendant's personal information, including potentially message content, with ***even more unspecified third parties***. Defendant's Confide messages or metadata related to the messages could be stored by numerous third parties. In *Tipton v. Barton,* 747 S.W.2d 325, 329 (Mo.App. E.D.1988) the court wrote "It is the board of aldermen

and the mayor that direct the city coordinator to keep all records belonging to the city. Therefore, the trial court properly found that the mayor, city coordinator and members of the board of aldermen each have legal control over the subject billing statements to retain them for purposes of the Open Meetings Act." *Id*. In this case, the Governor and his staff directed a third-party communications vendor to store for an unknown period of time public records, transmit Defendant's communications, and even sell some information to other unknown third parties. The governor and his staff made these decisions affirmatively.

Count IV and V regarding Phone Record and Phone Numbers State a Valid Cause of Action

In fact, the record demonstrating Defendant's ***Confide download date*** or download dates for similar apps, was also requested in Plaintiff's Sunshine request. Defendant replied that they had no responsive records to the ***Confide download date (Count IV)*** and responded that the exact same record was "closed" regarding the request for the ***Signal download date, (Count V).*** Defendant admits retaining this record of the Signal download date. How can defendant explain how he has a record of one app download date but not the other. The Count IV record of the Confide download date should be stored on Defendants phones, just like the Signal download date, and the download date is also likely stored by Defendant's communications vendor, Confide Inc. It's quite improbable that Defendant reached out to Confide seeking assistance in responding to Plaintiff's Sunshine request, even though that would be a government record in the possession of a licensed third party. As such Defendants violated their duty under the law. The Motion to Dismiss Court IV and V should be denied because the pleadings set out an adequate cause of action for each.

Missouri Residents Have Standing and a Private Right of Action under Chapter 109 Public and Business Records

Plaintiffs have valid causes of action under the Sunshine law to deny Defendant's motion to dismiss on all those claims. Once Defendant recognizes that, they will be less interested in dismissing the Chapter 109 claims as part of their formula to benefit themselves by their own public record destruction. But the Chapter 109 Public and Business Records ("Public Records") allegations cannot and should not be dismissed either. Chapter 109 began contemplating the right of private action and civil actions brought by Missouri residents as far back as 1939 when Section §109.030 created civil penalties for an officer that failed to deliver records and "shall pay to any person injured by the detention of such records, books or papers all damages which may accrue to him, to be recovered by civil action" §109.030(2). In 1961, Missouri stepped up the remedies to include removal, impeachment, misdemeanor, fines and even imprisonment. §109.180. Plaintiff's research shows seventeen cases wherein private plaintiffs, residents of Missouri, either sued under Chapter 109 or a court's interpretation of §109.180 appeared to be relevant to whether or not a private litigant was entitled to a public document. Plaintiff could not find one court ruled that Missouri residents don't have a private right of action under Chapter 109 and not one case was cited by Defendants for this proposition. Private parties routinely sought remedies under Chapter 109. Incidentally, Plaintiff couldn't find a case where the government removed, impeached, or imprisoned a government official for violating Chapter 109[2]. The history of Chapter 109 appears to be exclusively a history of civil actions.

Private parties bringing actions under Chapter 109 resulted in government documents being turned over to the private plaintiffs. (*State ex rel. Gray v. Brigham*, 622 S.W.2d 734 (Mo. App.

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[2] "That's the difference between governments and individuals. Governments don't care, individuals do". Mark Twain, *A Tramp Abroad.*

E.D., 1981) (occupancy permits are public records open to inspection under § 109.180.) *Pulitzer Pub. Co. v. Missouri State Employees' Retirement System*, 927 S.W.2d 477 (Mo. App.W.D., 1996) (trial court erred in dismissing Pulitzer's petition sued under 109.180)

The private right of action for Chapter 109 created in 1939 set the standard for private rights of action being available for all the subsequently passed laws under Chapter 109.[3] In addition, under any scenario, Plaintiff's petition is sufficient because Missouri law doesn't preclude a private right of action for injunctive relief. Egan v. St. Anthony's Medical Center, 244 S.W.3d 169, 173 (Mo. banc 2008) (finding that the general rule against a private right of action to enforce a state statute' pertains to damages and does not preclude injunctive relief). Defendants Motion to Dismiss all Plaintiff's claims asserted under Chapter 109 should be denied.

Plaintiff has Alleged that Defendants Destroyed or Attempted to Destroy Public Records That Should Have Been Retained and Must be Assumed True Therefore Defendants Contradictory Arguments about the Nature of those Communications or the Findings of Third Parties are not Relevant

No Missouri case law, legal authority, statute or rule classifies an email or text message, sent or received, that touches on public business as "transitory" --- that can be immediately destroyed. The new pseudo-legal concept that a written communication by agency officials can be immediately destroyed if they make the determination that the message is "transitory" is a factual argument outside the pleadings at this stage of the litigation, but because it is do important, Plaintiff feels the need to weigh in and state --- it is legally incorrect, a dangerous concept and, if ultimately accepted by any court or administrative or legislative body, this exception will swallow the

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[3] Notably, 109.080 also grants an aggrieved person the right to proceed against a non-governmental private party if that private person is in possession of records pertaining to public office when that person fails to deliver them to the relevant officer or Custodian of Records and the private party shall be proceeded against in all respects as provided for in Chapter 109, including civil lawsuit

Sunshine law whole. Coincidentally, this new advisory definition of “transitory” only took shape on February 1, 2017, *one day before Plaintiff attempted to obtain a Temporary Restraining Order against the Missouri governor*. As counsel for the governor said at the hearing “..this is a report that was issued by the Attorney General’s office *last night*..” *TRO Hearing Transcript*, February 2, 2018, p. 18. This advisory report contained a radical re-interpretation of Missouri Agency Records disposition Schedule and it should be ignored. For the first time in Missouri history, the AGO argued that the “transitory” classification of the record retention laws is to be loosely interpreted, allowing immediate destruction of a wide variety of official communications, emails and text messages, and furthermore, the sender and/or recipient can decide alone, instantly, and even in a premeditated manner, whether the public record about public business can be destroyed. The advisory opinion was a radical departure from the prior understanding of the law. *See “What is a Record”, Secretary of State, attached as Exhibit A*. Ironically, this radical report offered little guidance about what is and what is not a transitory communication, leaving that interpretation up the sender and recipient. This advisory opinion threatens to inject great mischief into the body politic unless and until this Court rules on the proper interpretation of “transitory” documents. Plaintiff is confident that he will prove, after discovery, that the Defendants tried to delete important and substantial communications about the public business that falls under Missouri document retention classifications calling for retention, but regardless, Plaintiff strongly believes this Court should weigh in, eventually, on the meaning of “transitory”. Whether expedient or not, the AGO’s advisory definition of “transitory” is a broadside attack on Chapter 109 and Chapter 610 Sunshine Law. (See footnote 1 and the failed experiment in Wisconsin).

Plaintiff’s will deal with the advisory legal opinion more fully at a more advanced stage of this litigation, but Plaintiff must also briefly address the AGO’s fact-finding because it is again

deeply relied on by Defendants. Notwithstanding the Alice-in-Wonderland quality of the AGO's fact finding, and methods of determining the truth of witnesses by the shiftiness of their eyes, Defendants are not protected by the AGO's advisory legal interpretations or fact-finding at any stage of these proceedings. The AGO complained they didn't have subpoena power, couldn't interview the governor, and were unwilling to argue over the governor's assertion of executive privilege. The AGO couldn't even ask the governor's staff about the general nature of their Confide communications with the governor. Outside of the Office of Governor's Press Releases -- there is no AGO finding that the Confide communications sent or received between the governor and his staff were "transitory" or otherwise the type of communications appropriate to destroy under the Agency Records Disposition Schedule. That never happened. The AGO only attempted to address Confide communications by and among a few members of the governor's staff (not all). To date, there has been no inquiry from any government agency (that Plaintiff is aware of) into the facts relevant to this case. Defendants obviously want to shut down the Cole County inquiry too because it's in their best interests. That cannot happen because Plaintiff has offered to this Court a sufficient pleading stating valid causes of action. Separation of powers principles gives this court, not the various members of the executive branch, the authority to interpret Chapter 610, Chapter 109 and Missouri Retention rules. For purposes of a Motion to Dismiss, the Court must assume Plaintiff's allegations that Defendants illegally or improperly destroyed communications are true, therefore that the communications destroyed were not "transitory".

Plaintiff will demonstrate to this court at the summary judgment and trial stage that the messages sent and received by the Defendants using Confide do not qualify as "transitory" communications that can be immediately destroyed under Missouri rules. Plaintiff is confident that he will be able to prove by a preponderance of the evidence that the communications Defendants

sent and received, using Confide, by the Governor and Governor's Office staff were communications that should have been retained permanently, in the case of the governor, and six years, in the case of his staff, pursuant to the rules. See Agency Records Disposition Schedule, General Retention Schedule, Series 21530 and 21531.

Defendants may have violated the statutory litigation hold

Plaintiff served his Sunshine request on Defendant Custodian of Records on December 20, 2017. The lawsuit was filed on December 29, 2017. The Custodian of Records issued a litigation hold on January 3, 2018, and also a statutory litigation hold under the Sunshine Law was triggered demanding that the person in control of the record "shall not transfer custody, alter, destroy, or otherwise dispose of the public record sought to be inspected and examined notwithstanding the applicability of an exemption…or the assertion that the requested record is not a pubic record until the court directs otherwise." RSMo. § 610.027 (1).

Therefore, two litigation holds are in place regarding the use of Confide. If the Defendant Governor or John Does continued to use Confide after they had notice of the litigation, which Plaintiff believes they did, then Defendants created and destroyed or attempted to destroy the Confide communications requested in direct violation of § 610.027 (1). As this Court said when Plaintiff asked the Court to turn Defendant's affidavit into a Order of the Court, "I think the statute is broader than their affidavit", TRO Hearing Transcript, Feb. 2, 2018, p. 31. Plaintiff agrees.

Plaintiff brings this to the Court's attention because even if after the litigation holds were put into place Defendants sent or received even one Confide message, about any topic, without preserving it, that alone would be a direct violation of the Sunshine law § 610.027(1). For the purposes of Defendant's Motion to Dismiss, Plaintiff believes the Court should also take into consideration Plaintiff's allegations in the Amended Petition that Defendants continued to use

Confide and continued to attempt to destroy or destroy communications. It's unlikely that the use of Confide in the Governor's office violated no laws *before litigation was filed*, but then only violated § 610.027(1) after litigation was filed, but it is nonetheless a possibility, especially considering that the litigation holds cover Confide communications of any kind, whether "transitory" or not. If, by the Defendant's own admission, the retention rules were more restrictive after litigation was filed, it's very possible if not likely that Defendant Governor or one of his many staff members who used Confide violated those stricter retention rules, especially considering Defendant's defiant and full-throated argument in his first Motion to Dismiss that the Governor had a First Amendment right to destroy public records or use Confide. To be specific, Plaintiff have alleged the continued use of Confide in their amended petition and asked this court to enjoin the continued use of Confide notwithstanding "policy changes" or "promises" of the Defendants, which is no way render Plaintiff's request for an injunction moot. The issue of whether Defendants violated their own litigation hold or § 610.027(1) requires further discovery, yet another reason to deny the Motion to Dismiss.

Conclusion

Plaintiff's amended petition alleges valid causes of action, in its entirety, and assuming all facts to be true, Defendants Motion to Dismiss should be denied.

Dated: April 5, 2018

Respectfully submitted,

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Certificate of Service:

The above counsel certifies service on all counsel of record through the Missouri electronic filing system on April 5, 2018