

STATE OF MISSOURI)
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CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

FILED
JUL 18 2023
22ND JUDICIAL CIRCUIT
BY CIRCUIT CLERK'S OFFICE
DEPUTY

AARON MALIN and SHOW-ME
CANNABIS REGULATION, INC.,

Plaintiffs,

vs.

METRO MULTI JURISDICTIONAL
UNDERCOVER DRUG PROGRAM, et
al.,

Defendants.

Cause No. 1522-CC00312

Division No. 5

JUDGMENT

In Count I of their Petition¹, Plaintiffs Aaron Malin and Show-Me Cannabis Regulation, Inc. (collectively "Plaintiff" or "Mr. Malin"), allege that Defendants, governmental bodies and employees of governmental bodies, knowingly and/or purposely violated Missouri's Sunshine Law², by failing to provide records Plaintiff requested regarding an anti-narcotics drug task force operated jointly by the St. Louis Metropolitan Police Department ("SLPD") and the City of Maryland Heights Police Department ("MHPD"). Defendants in this action are Metro Multi-Jurisdictional Undercover Drug Program ("MMJUDP"); Mayor Lyda

¹ Plaintiff has dismissed Count II of his two-count Petition.

² RSMo. § 610.010 et seq.

Krewson; St. Louis Police Chief John W. Hayden, Jr.; St. Louis Fire Department Chief Dennis Jenkerson; St. Louis Public Safety Director Jimmie Edwards; and Mark Lawson³, who is former Secretary and General Counsel for the St. Louis Police Board. Plaintiff seeks judgment in his favor and an order requiring Defendants MMJUDP, Mr. Dotson, and Mr. Lawson to pay Plaintiff's costs and attorney fees. Plaintiff also seeks civil penalties against these Defendants in the amount of \$5,000 per violation pursuant to § 610.027.

A bench trial of this matter was held on May 16, 17, and 18, 2018. Trial briefs were submitted, evidence was adduced, and the Court took the matter under submission. Plaintiff has requested specific findings of fact and the Court's opinion pursuant to Rule 73.01. The Court has endeavored to denominate its findings as "Findings of Fact" or "Conclusions of Law" where it is possible to do so. Any finding denominated as a finding of fact that should be considered a conclusion of law shall be

³ Plaintiff sued Mayor Francis Slay and Police Chief Samuel Dotson as parties in their official capacities. In April 2017, Mayor Lyda Krewson took office replacing Mayor Slay. John Hayden has since been appointed Police Chief, and Jimmie Edwards has since been named the director of the City of St. Louis Department of Public Safety. Under Rule of Civil Procedure 52.13(d), Mayor Krewson, Jimmie Edwards and Chief Hayden are automatically substituted as parties in this action. See Rule 52.13(d) (stating that when a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the successor is automatically substituted as a party).

considered a conclusion of law, and any finding denominated as a conclusion of law that should be considered a finding of fact shall be considered a finding of fact. Finally, the Court has adopted some of Plaintiff's proposed findings of fact.

The Court has considered the testimony of each witness and has made judgments regarding the credibility of each witness. The Court has accepted some of the testimony as credible and has rejected other parts of the testimony as not credible. The Findings of Fact and Conclusions of Law in this Judgment are consistent with the Court's determination of the credibility of the evidence and of the witnesses.

Findings of Fact

1. Beginning in 2007, the SLPD operated MMJUDP⁴ in conjunction with the City of Maryland Heights.
2. Each year between 2007 and 2014, the Police Board entered into a "Contract and Agreement" with Maryland Heights "to cooperate in the formulation of a multi-jurisdictional task force."

⁴ "MMJUDP" is merely an acronym used during the litigation and trial of this matter. The Court's use of the term should not be read to imply that Defendants or the SLPD used the term.

3. The 2011, 2012, and 2013 versions of the "Contract and Agreement" between the SLPD and MHPD used the term "drug task force," and the term "task force" multiple times. They also included in capital letters the phrase "THE PARTIES REPRESENT THAT THEY HAVE EACH CAREFULLY READ THIS AGREEMENT AND UNDERSTAND [sic] ITS PROVISIONS AND CONDITIONS."

4. Mark Lawson, the Secretary and Legal Counsel to the Police Board, personally signed each year's "Contract and Agreement" on behalf of the Police Board.

5. The SLPD annually applied to the Missouri Department of Public Safety ("DPS") for grant funding that, if awarded, could only be used in support of the MMJUDP operations.

6. These DPS grants were federally funded by the "Edward Byrne Memorial Justice Assistance Grant Program."

7. Mr. Lawson and other members of the SLPD referred to the grant program—and in some contexts the MMJUDP itself—as the "Ed Byrne" grant or program.

8. The SLPD and its ranking officers did not use the terms "drug task force" and "Metro Multi Jurisdictional Undercover Drug Program (MMJUDF)". Rather they used various terms such as "Narcotics Division," the "Narcotics Unit," the

"Narcotics Assistance Program," or the "NAP," the "Narcotics Control Assistance Program," or the "NCAP," among others.

9. In 2011, 2012, and 2013, the SLPD applications for DPS grant funding identified the "Applicant Agency" as "St. Louis Metro Police Department, Drug Task Force."

10. In 2014, the SLPD's application for DPS grant funding identified the "Applicant Agency" as "St. Louis City, Drug Task Force."

11. In order to qualify for DPS grants, the applicant was required to establish a Policy Board that would oversee the MMJUDP's operations and to make such reports to DPS as that department might require.

12. On November 26, 2012, the SLPD informed DPS that it had established a Policy Board that included the Chief of the Police Department, the Chief of the Maryland Heights Police Department, the Chief of the St. Louis Fire Department, and the Director of Public Safety for the City of St. Louis.

13. From 2011 to 2014, the MMJUDP regularly submitted reports to DPS, in accordance with DPS's instructions. Each of these reports identified the "Applicant Agency" as either "St. Louis Metro Police Department, Drug Task Force" or "St. Louis City, Drug Task Force."

14. The MMJUDP retained documents related to its activities, including budgetary documents, documents showing the quantity of weapons and narcotics found by the MMJUDP, documents reflecting assets seized via civil or criminal asset forfeiture, and documents referencing the MMJUDP as "St. Louis Metro Police Department, Drug Task Force" or "St. Louis City, Drug Task Force."

15. Prior to March, 2013, the MMJUDP had been included on the Police Department Organizational Chart as part of "Narcotics," commonly referred to in internal documents as the "Narcotics Unit."

16. In March, 2013 the Police Chief, Sam Dotson, merged the Narcotics Unit into the Special Operations Unit. Under the Special Operations Unit the narcotics duties were designated as NCAP on the Department's Organizational Chart.

17. The SLPD told DPS in light of this reassignment that "all officers assigned to the Special Operations Unit were cross-trained in all aspects of the unit, be it narcotics investigations, fugitive apprehensions, auto theft and apprehension of the most violent offenders in the City of St. Louis."

18. Throughout 2013 the MMJUDP continued to receive grant funding from DPS and to make regular reports to DPS regarding MMJUDP's activities.

19. From at least April 13, 2011, to September 13, 2013, Mark Lawson personally signed documents related to the "multi-jurisdictional drug task force" that the SLPD operated in cooperation with the MHPD.

20. In 2011, 2012, and 2013, the SLPD's applications to DPS for grant funding designated Mr. Lawson as the MMJUDP's "Authorized Official" who had the ability to legally bind the SLPD in a contract with DPS.

21. Each of the Department's applications for DPS funding in 2011, 2012, and 2013 indicated that Mr. Lawson had read the application, had certified that the information in the application was true and correct, and had agreed to the terms and conditions of the grant. However, he never actually read the applications completely. Instead he merely gave them, as he testified, a "*pro forma*" going-over.

22. In 2011, 2012, and 2013, Mr. Lawson personally signed the Awards of Contract and Certified Assurances that DPS required before it would provide the MMJUDP with grant funding.

23. In August, 2013, the governance of the St. Louis Police Department radically changed. The Department ceased being a State Agency and became a division of the St. Louis Department of Public Safety. The Board of Police Commissioners until then was responsible for governing the Department and setting policy. It ceased to exist at that time.

24. Along with this change and the appointment of Sam Dotson as police chief came several restructurings within the Department. Personnel were shifted, the narcotics unit was abolished and NCAP was moved into Special Operations.

25. On September 12, 2013, under Mark Lawson's name, the MMJUDP submitted to DPS a Contract Adjustment naming Police Chief Samuel Dotson as its new Project Director and changing its Authorized Official from Mark Lawson to Mayor Francis Slay.

26. At all relevant times Mr. Lawson was familiar with the requirements of the Sunshine Law and the penalties for knowingly or purposely violating the Sunshine Law, having litigated several cases involving the Law.

27. Over the course of any given year, including all relevant years pertinent to this litigation, Mr. Lawson signed hundreds of documents and contracts on behalf of the Police

Board, many of which he did not read completely, and which he signed after a "pro forma" or perfunctory check.

28. On November 26, 2013, Plaintiff Aaron Malin submitted a Sunshine Law request (the "First Request") directed to the "St. Louis Metro Drug Task Force Custodian of Records." He requested the production of the Drug Task Force budgetary documents, documents showing the quantity of weapons and narcotics found by the Drug Task Force, and documents reflecting assets the Drug Task Force seized via civil and criminal asset forfeiture.

29. Mr. Lawson directly responded to Mr. Malin's records request on December 2, 2013. Mr. Lawson did not forward the First Request to Barbara Manuel-Crossman, the Custodian of Records for the SLPD.

30. At that time, Mr. Lawson should have been aware that the MMJUDP existed and that the Police Department likely retained the documents Mr. Malin requested. However, because Mr. Lawson, the Police Chief, the Commander of the Special Operations Unit, and the SLPD special orders and police manual did not refer to the MMJUDP as the "St. Louis Metro Drug Task Force," or as any other "task force," Mr. Lawson did not

understand Mr. Malin's request to be referencing documents from the MMJUDP.

31. Mr. Lawson responded by email to Mr. Malin's First Request, stating that "The St. Louis Metropolitan Police Department whose jurisdiction extends over the City of St. Louis, does not have a 'St. Louis Drug Task Force.' Therefore, we have no records responsive to your request."

32. On December 4, 2013, Mr. Malin provided Mr. Lawson a link to the Missouri Highway State Patrol map that had led Mr. Malin to believe that the "St. Louis Metro Drug Task Force" existed. The map indicated that some twenty-six jurisdictions had ongoing drug task forces. One of these was the "St. Louis Metro Drug Task Force." Mr. Malin called the number listed for the St. Louis Metro Drug Task Force. The person answering gave him a fax number to which he could send his request for records.

33. On December 27, 2013, Mr. Malin submitted another request (the "Second Request") seeking "documentation justifying or establishing as fact the claim that" the SLPD did not have a "St. Louis Metro Drug Task Force," and seeking all documents that mentioned or referenced several permutations of the phrase "St. Louis Metro Drug Task Force."

34. On January 7, 2014, Mr. Lawson responded to the Second Request:

I wanted to acknowledge your request. I apologize for the slowness, as I was out of the office between Christmas and New Years, and I guess no one acknowledged the request in my absence.

The phone number you got [from the State Highway Patrol website] belonged to a person who used to head up the Department's Narcotics Unit, however, the Department no longer has a separate Narcotics Unit, as the work formerly done by that Unit has now been tasked to either detectives at the respective regional substations, or the Intelligence Unit. Therefore, I suspect the phone number was just reassigned to someone else. The person who now occupies the office at the fax number you sent the request to, who has nothing to do with a drug task force, is the one who notified me that our Department does not have a drug task force. I have looked at the Department's Special Orders for the term "drug task force," and have found no such verbiage.

Nevertheless, I will attempt one more inquiry through a senior employee. But if that is not fruitful, I'm not sure how I can produce records of the non-existence of something.

35. Mr. Lawson did not forward the Second Request to the Custodian of Records and did not indicate to Mr. Malin that his Second Request had not been delivered to the Custodian of Records.

36. Major (then Captain) Mary Warnecke, Commander of Special Operations Unit, informed Mr. Lawson that the Department did not have a Drug Task Force. Mr. Lawson did not inquire any further into Mr. Malin's request at that time.

37. On January 27, 2014, Mr. Lawson followed up on his email of January 7, 2014:

Aaron, I brought this up to the Chief of Police, which is about as high as I can go, and he has no knowledge of something called the St. Louis Metro DTF ever being in existence, and doesn't know what the Missouri Highway Patrol could be referencing.

38. In making the statements that the SLPD had no "Drug Task Force," Mr. Lawson relied his own knowledge of SPLD operations and on the statements of two command rank police officers with combined experience of over fifty years on the Department.

39. The MMJUDP continued to operate, to receive grant funds from DPS, and to submit reports on its activities to DPS until at least September, 2014.

40. In April, 2014, Mr. Malin received documents from DPS that confirmed the MMJUDP's existence and showed that Mr. Lawson was its Authorized Official. This was the first point at which Mr. Malin could ascertain that Mr. Lawson failed to produce documents responsive to his First Request and Second Request.

41. On April 21, 2014, Mr. Malin sent the following email to Mr. Lawson:

In the past, we discussed the existence of a drug task force involving STLPD. When I filed a sunshine request, you advised me that the task force didn't exist, or at least that you were unaware of its existence. However, through

the Department of Public Safety, I was able to acquire records relevant to the 'nonexistent' task force, and on the very first page (see below), you are personally named as the authorized official for a grant for the "Metro Multi-Jurisdictional Undercover Drug Program" which was quite clearly the task force referenced by the Missouri Highway Patrol website (they even had the same listed phone number).

How were you possibly unaware of its existence?

42. Mr. Lawson did not respond to Mr. Malin's April 21, 2014, email.

43. On November 11, 2014, Mr. Malin submitted another records request (the "Third Request") to the attention of "Custodian of Records for STL Metro Multi-Jurisdictional Undercover Drug Program," seeking Policy Board meeting minutes for the MMJUDP.

44. On November 12, 2014, Mr. Malin received an unsigned acknowledgment that the Police Department had received the Third Request and that "due to a backlog of requests," the Police Department anticipated "responding concerning the availability of records requested sometime during the week of December 1."

45. On December 8, 2014, having heard nothing further from the Police Department, Mr. Malin sent an email inquiring into the status of his Third Request.

46. On December 11, 2014, Public Information Officer Schron Jackson responded, "I'll check on the status of your request and will let you know."

47. The Police Department did not provide any further information about this Third Request for a few weeks. On January 7, 2015, SLPD paralegal Danielle Eckrich identified the Policy Board members. She stated that there were no records responsive to Mr. Malin's request because "The Policy Board you referenced was created to comply with the grant requirement, however, they never met or had any meetings."

48. At the trial she testified that typically "Legal" would handle requests of this nature.

49. Although the Plaintiff's Sunshine Law Requests were made in "language that a reasonably competent custodian of records would understand," (Anderson v. Village of Jacksonville, 103 S.W.3d 190, 196 (Mo.App. W.D. 2003)) they were not in the commonly used parlance or jargon of the SLPD.

50. One recognized procedure for handling Sunshine Law requests within the SLPD was that requests received by a department could be forwarded to the Custodian of Records, Barbara Manuel-Crossman. She then would send the request to the

relevant department, so it could accumulate and forward to her the appropriate documents.

51. Chief Dotson explained that there were two ways to handle sunshine requests. One was to forward the request to the Department's Public Information Officer; the other was to refer the request directly to the City Counselor.

52. Ms. Manuel-Crossman was aware that despite the above protocol, the Legal Department, sometimes handled Sunshine requests sent to that department.

53. Ms. Manuel-Crossman testified she was aware that a drug task force existed. She testified that had she received a request for records of a "Drug Task Force," she would have sent the request to the Legal Department. She said that if the response from the Legal Department had been that no such records exist, she would have inquired further because she knew a drug task force existed.

54. Although Mr. Lawson was not the Custodian of Records for the SLPD, he directly responded to Mr. Malin's requests.

55. The MMJUDP was a public governmental body subject to the Sunshine Law.

Conclusions of Law

Based on the above findings of fact, the Court now makes

the following conclusions of law:

Plaintiff seeks penalties, costs, and attorney's fees under § 610.027 RSMo, alleging Defendants have each committed a knowing and purposeful violation of § 610.023. Accordingly, Plaintiff has the burden to prove, by a preponderance of the evidence, that Defendants knowingly and purposely violated the Sunshine Law when they failed to produce the requested records. Strake v. Robinwood W. Cmty. Improvement Dist., 473 S.W.3d 642, 645 (Mo. banc 2015). Whether Defendants' conduct brings them within the scope of the statutory definitions of knowing or purposeful conduct is a question of fact. Am. Civil Liberties Union of Missouri Found. v. Missouri Dep't of Corr., 504 S.W.3d 150, 154 (Mo.App. W.D. 2016). Therefore, the Court must determine whether the Defendants' conduct was knowing or purposeful, as those terms are used in § 610.027, when Defendants failed to provide the records Plaintiff requested. See Laut v. City of Arnold, 491 S.W.3d 191, 196-97 (Mo. banc 2016). The meaning of the terms knowing and purposeful as set out in § 610.027 is a question of law. *Id.* at 196.

The provisions of the Sunshine Law are generally liberally construed, and exceptions thereto are strictly construed in order to promote the public policy of open records. Id.

However, the portions of the Sunshine Law that allow for the imposition of a civil penalty and award of attorney fees and costs are penal in nature and must be strictly construed. Id.

To establish a knowing violation of the Sunshine Law, Plaintiff must prove the Defendants had actual knowledge that their conduct violated a provision of the Sunshine Law. Strake, 473 S.W.3d at 645. "While a violation of the Sunshine Law does not itself require knowledge that a violation is occurring, imposition of a penalty does." Laut, 491 S.W.3d at 199. The standard required to prove a purposeful violation under §610.027 is greater than the standard required to prove a knowing violation. Id. at 193. The Missouri Supreme Court has defined such purposeful conduct as "acting with a conscious design, intent or plan to violate the law and [doing] so with awareness of the probable consequences." Id. (internal citations omitted). A purposeful violation involves proof of intent to defy the law or achieve further some purpose by violating the law. Id. at 200.

The evidence supports the Court's conclusion that Mr. Lawson violated the Sunshine Law by withholding open public records that were responsive to Mr. Malin's First and Second Requests. Given the indisputable fact that Mr. Lawson personally

signed dozens of documents, including grant applications, grant reports, some that he attested to having read, and which contained clear references to a "Drug Task Force," Mr. Lawson should have independently understood Mr. Malin's request and provided the records. Mr. Malin's requests were in language a reasonable custodian of records would understand; the records were not subject to being closed records; and Mr. Lawson did not provide them to Mr. Malin. Had Mr. Lawson referred Mr. Malin's records requests to Ms. Manuel-Crossman, the appointed Custodian of Records, she would have recognized that the requests were for records related to the MMJUDP. Mr. Malin would have obtained the records he sought. Had Mr. Lawson directed Mr. Malin to the appointed Custodian of Records or to the Public Information Office, Mr. Malin probably would have obtained the records he sought.

The question to be answered now is whether Mr. Lawson's failure to refer Mr. Malin to the appointed Custodian of Records, and failure to provide the records himself was "knowing" or "purposeful" within the meaning of the Sunshine Law, such that he and/or the other Defendants may be held liable under § 610.027. It is Plaintiff's burden to establish that the public entity's violation was knowing or purposeful. §610.027.2.

The Court finds and concludes that Plaintiff has not carried his burden of establishing a knowing violation of the Sunshine Law. Plaintiff did not establish that Mr. Lawson had actual knowledge that his conduct violated a provision of the Sunshine Law. Strake, 473 S.W.3d at 645. The Court's evaluation of Mr. Lawson's testimony is that he testified truthfully. While this Court believes a reasonable person in Mr. Lawson's position would have understood Mr. Malin's requests and provided records responsive to those requests, Mr. Lawson's failure to do so was negligent, not knowing or purposeful.

There was no evidence suggesting that Mr. Lawson had any motive for withholding the records. Mr. Lawson's email communications with Mr. Malin indicate that Mr. Lawson made at least three attempts to determine whether a "drug task force" existed. Both Mr. Lawson and Chief Dotson testified that the Department did not refer to the MMJUDP as a "St. Louis Metro Drug Task Force" or any other kind of drug task force.

The Court believes that "best practices" would be for Mr. Lawson to have forwarded Mr. Malin's requests to the SLPD Public Information Officer or to the Custodian of Records. The Court opines that had he done so, this lawsuit may not have been necessary. However, the evidence does not support the conclusion

that Mr. Lawson knew he was violating the Sunshine Law when he failed to refer Mr. Malin's requests to the Public Information Officer or to the Custodian of Records, or when he, acting on his own, failed to provide the documents Mr. Malin requested. For these same reasons, Mr. Lawson's failure to provide the records was not purposeful. He did not act with a conscious design, intent, or plan to violate the law and with awareness of the probable consequences. Laut, 491 S.W.3d at 199.

With respect to Mr. Malin's Third Request, Defendants' untimely response to his Third Request was also a violation of the Sunshine Law. Section 610.023 requires a governmental body to provide access to a public record no later than the third business day following the date the request is made, though the period of document production may exceed three days for reasonable cause. § 610.023.3.

Here, Mr. Malin made his Third Request on November 11, 2014. The next day he received an email from the SLPD that it had received his request, but due to a backlog of requests, the Police Department anticipated responding to his request by December 1, 2014. However, the Police Department did not provide a substantive response until January 7, 2015. On that date paralegal Danielle Eckrich identified the Policy Board members

but stated that there were no records of Board meetings because the Board never had any meetings. Ms. Eckrich testified as to her efforts to determine whether records existed that were responsive to Mr. Malin's Third Request, including her having contacted Mr. Lawson and others in the Department.

Under Section 610.027.3, when a governmental body knowingly violates sections 110.010 to 610.026, "the court may order the payment of costs and reasonable attorney fees to any party successfully establishing a violation." This part of the statute is permissive—that is, the Court has discretion as to whether costs and attorney fees should be ordered in a particular case. The Court has reviewed the matter and notes that Mr. Malin's request was filed and processed during the holiday season, and Plaintiff did receive a substantive response, albeit a tardy one. Under all the circumstances, the Court does not believe costs and attorney fees are warranted with respect to Plaintiff's Third Request.

THEREFORE it is Ordered and Decreed that Judgment is entered in favor of Defendants and against Plaintiffs on Count I of Plaintiffs' Petition. Costs are charged against Defendants.

SO ORDERED:

Mark H. Neill 24183
Mark H. Neill, Judge

Dated: July 18, 2018