

**IN THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI
AT JOPLIN**

COMMUNITY NEWSPAPER HOLDINGS, INC.)
d/b/a THE JOPLIN GLOBE)
Relator,)
)
vs.)
)
CITY OF JOPLIN)
and)
BARBARA HOGELIN,)
Respondents.)

FILED Melissa Holcomb, Circuit Clerk 03-31-2014 JASPER COUNTY CIRCUIT COURT JOPLIN, MISSOURI

Case No. 14AO-CC00050

PERMANENT WRIT OF MANDAMUS AND JUDGMENT

Now on this 31st day of March, 2014, the Court calls this case for hearing. Relator The Joplin Globe appears by its representatives Michael Beatty and Carol Stark and by relator’s counsel, Charles E. Buchanan and William E. Peterson. Respondents City of Joplin (hereinafter also referred to as “City”) and Barbara Hogelin appears by respondents’ counsel, Karl W. Blanchard, Jr. and R. Tyler Strodtman. The parties announced ready to proceed.

The parties agreed that Exhibits 1 through 14 should be admitted with Exhibits 6 and 13 undisclosed subject to the Court’s judgment. Exhibit 14 was admitted and filed in open court. No evidentiary hearing was held. Argument heard and relator’s petition for permanent writ of mandamus taken under advisement. Having considered the evidence, briefs, and arguments of the parties, and being fully advised in the premises, the Court makes the following findings of fact and conclusions of law and enters its Permanent Writ of Mandamus and Judgment:

FINDINGS OF FACT

1. Relator Community Newspaper Holdings, Inc. is a corporation licensed to do business in the State of Missouri and is in the business of publishing a newspaper in the City of

Joplin known as The Joplin Globe, with its principal place of business in Joplin, Jasper County, Missouri.

2. Respondent The City of Joplin is a municipal corporation licensed under the laws of the State of Missouri with its principal office in the City of Joplin, Jasper County, Missouri.

3. Respondent Barbara Hogelin is the City Clerk for the City of Joplin who is charged with the duty to provide documents to the public upon request under § 610.011 RSMo,¹ Missouri's Sunshine Law, which provides that "[i]t is the public policy of [Missouri] that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law."

4. Prior to the initiation of this lawsuit, a public controversy arose in Joplin concerning the conduct of two elected members of the Joplin City Council: Mayor Pro Tem Bill Scarce and Council Member Mike Woolston.

5. On October 21, 2013, the Joplin City Council met and discussed hiring an investigator to investigate the conduct of the elected officials, Mr. Scarce and Mr. Woolston, as a result of the aforesaid public controversy.

6. The Joplin City Council agreed to hire Mr. Loraine to conduct the investigation into the conduct of the elected officials on October 21, 2013.

7. The City entered into a written agreement (henceforth "Agreement") with Mr. Loraine on November 11, 2013, regarding his independent third party investigation into Mr. Scarce and Mr. Woolston's conduct.

¹ All statutory references herein are to the Revised Statutes of Missouri unless noted otherwise.

8. Exhibit 4 of Respondent's Suggestions in Opposition to Petition for Mandamus contains a true and accurate copy of the contractual Agreement between the City and Mr. Loraine and related council bill authorizing the City to enter into the agreement.

9. The Agreement expressed the City's "desire[] to employ the services of Loraine as an independent third party investigator" and Loraine's "desire[] to accept this investigative position." Loraine was given "complete and unfettered control and discretion to conduct the investigation as he sees fit." Ex. 4.

10. Pursuant to the Agreement, Loraine was employed by the City to "perform an independent investigation into three (3) issues" concerning the elected members Mr. Scarce and Mr. Woolston:

a. The conduct of Mayor Pro Tem Bill Scarce involving a lease of a building to an individual later convicted of "bookmaking." Specifically, the agreement expressed the City's desire that Loraine request the file held by the Federal Bureau of Investigations (FBI) regarding Mr. Scarce's conduct and to provide the FBI's report to the City Council.

b. The facts and circumstances surrounding the release of information related to Mr. Scarce's conduct, including, but not limited to, the handwritten "note" referenced by Mr. Scarce in City Manager Mark Rohr's handwriting.

c. The facts, circumstances, and ethical considerations surrounding the involvement of Council Member Woolston with Mr. Charlie Kuehn/Four State Homes, its subsidiaries and related entities, and the City's Master Developer, Wallace Bajjali, with respect to the purchase, sale, or leasing of real estate for current or future development. Ex. 4.

11. The Agreement expressly provided that “Loraine shall submit written findings and conclusions to the City council on the issues investigated, and this document shall be an open record made available under the Missouri Sunshine Laws.” Ex. 4.

12. On February 4, 2014, the City received from Mr. Loraine the results of his investigation into Mr. Scarce and Mr. Woolston’s conduct, which consisted of a report with attachments of exhibits and transcripts of witness statements (henceforth “Report”).

13. Exhibit 9 of Respondent’s Suggestions in Opposition to Petition for Mandamus contains a true and accurate copy of the portions of the Report that the City disclosed, which does not include all the pages of the Report and which did not include any of the attached exhibits or witness statements.

14. Exhibit 6 of Respondent’s Suggestions in Opposition to Petition for Mandamus is a true and accurate copy of the pages of the Report that the City did not disclose.

15. Exhibit 13 of Respondent’s Suggestions in Opposition to Petition for Mandamus is a zip drive of the witness statements taken by Mr. Loraine that were incorporated into the Report that the City did not disclose.

16. The Report identifies on Page 1 in Section II three “issues developed by investigation” and these three issues closely track the issues identified in the Agreement as noted in Paragraph 10, subparts (a) through (c) above. Ex. 9.

17. The Report identifies on Page 3 in Section IV three attachments to the Report:

a. Attachment A consists of documents that “were either volunteered by the above named witnesses, or requested form the witness by the Investigator[;]”

b. Attachment B consists of “texts of all municipal and state laws reviewed by the Investigator[;]” and

c. Attachment C consists of “a copy of Mr. [Charles] Genesio’s request for information from the FBI.”

18. The Joplin City Council held a special meeting on February 4, 2014, to receive Mr. Loraine’s Report.

19. Exhibit 5 of Respondent’s Suggestions in Opposition to Petition for Mandamus is a true and accurate copy of the agenda of the Joplin City Council Special Meeting on February 4, 2014.

20. Exhibit 5 evidences that the special meeting was closed under Section 610.021(1), which concerns “[l]egal actions, causes of action or litigation involving a public governmental body and any confidential or privileged communications between a public governmental body or its representatives and its attorneys.” Ex. 5.

21. Exhibit 10 of Respondent’s Suggestions in Opposition to Petition for Mandamus contain a true and accurate copy of the minutes of the Joplin City Council Special Meeting on February 4, 2014. The last page of Exhibit 10 is the minutes of the closed session of the Joplin City Council Special Meeting on February 4, 2014.

22. Exhibit 10 evidences that the minutes of the closed session indicates that “[t]he purpose of the Closed Session was to hear the investigative report from Tom Loraine regarding the contract and charge previous given to him, pursuant to the provisions of § 610.021(1) RSMo., as amended 2013.” Ex. 10.

23. The City released a “Press Copy” of the Report on or about February 4, 2014, but did not include all of the pages, attachments, and statements of the Report. Ex. 9.

24. The pages of the Report that were released refer to numerous complaints by citizens, public officials and past and present employees of the City of Joplin. These complaints,

as characterized by the Report, show that a Missouri statute relied on by the City for urban redevelopment “has not only been violated but wholly disregarded” and states that “[p]ublic demand requires this open debate” in reference to possible wrongdoing. The Report concludes that it raises issues requiring the City “to watch and guard the public trust. . . .” Ex. 9.

25. On or about February 6, 2014, The Joplin Globe requested disclosure of the full Report, including all attached exhibits and witness statements to the Report.

26. Exhibit 8 of Respondent’s Suggestions in Opposition to Petition for Mandamus is a true and accurate copy of The Joplin Globe’s request for the full Report as certified by Ms. Hogelin.

27. City Clerk Hogelin denied The Joplin Globe’s request on February 14, 2014, stating for the first time that the undisclosed portions of the Report are “closed records pursuant to 610.021 (3) and (13) RSMo 2013.” Ex. 9.

28. Section 610.021(3) provides that public records may be closed “to the extent they relate to . . . [h]iring, firing, disciplining or promoting of particular employees by a public governmental body when personal information about the employee is discussed or recorded.”

29. Section 610.021(13) provides that public records may be closed “to the extent they relate to . . . [i]ndividually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment[.]”

30. The Joplin Globe has made additional oral requests for disclosure of the complete Report and attachments since City Clerk Hogelin’s denial, but the City has not disclosed the requested documents.

CONCLUSIONS OF LAW

Respondents are subject to the requirements of Chapter 610, the Missouri Sunshine Law, and Exhibit 6 and Exhibit 13 are public records under § 610.010(6). On February 6, 2014, The Joplin Globe made a valid request for Exhibit 6 and Exhibit 13 pursuant to Chapter 610, which the respondents refused. Accordingly, respondents had the burden of persuasion in this matter to demonstrate compliance with requirements of Missouri's Sunshine Law. § 610.027.2. *See also Colombo v. Buford*, 935 S.W.2d 690, 694 (Mo. App. W.D. 1996). Respondents have failed to carry their burden of persuasion.

“The overarching purpose of the [Missouri] Sunshine Law is one of open government and transparency.” *Laut v. City of Arnold*, 417 S.W.3d 315, 318 (Mo. App. E.D. 2013). “An open society needs open institutions making open decisions openly arrived at.” *Librach v. Cooper*, 778 S.W.2d 351, 353 (Mo. App. E.D. 1989). Missouri's Sunshine Law “recognizes that the public has an interest in seeing how its government operates generally [and] ‘[t]hat interest may be at its greatest where ... public funds are spent.’” *State ex rel. Missouri Local Government Retirement System v. Bill*, 935 S.W.2d 659, 665 (Mo.App. W.D. 1996) (quoting *Librach v. Cooper*, 778 S.W.2d 351, 356 (Mo. App. E.D. 1989)).

The Missouri Supreme Court has explained the importance of the Sunshine Law as follows:

The public's right to inspect court and other public records comes not from any personal interest in the subject matter of the records. Rather, the right stems from the public's presumed interest in the integrity and impartiality of its government. . . . [O]pen records do not simply accommodate the public's amusement, curiosity, or convenience. Instead, it is simply beyond dispute that public records are freely accessible to ensure confidence in the impartiality and fairness of the judicial system, and generally to discourage bias and corruption in public service. “Without

publicity, all other checks are insufficient....” *I J. Bentham, Rationale of Judicial Evidence 524 (1827).*

Transit Cas. Co. ex rel. Pulitzer Publishing Co. v. Transit Cas. Co. ex rel. Intervening Employees, 43 S.W.3d 293, 300-01 (Mo. banc 2001) (internal citations omitted). *See also State ex rel. Pulitzer Missouri Newspapers, Inc. v. Seay*, 330 S.W.3d 823, 827 (Mo. App. S.D. 2011).

In order to ensure openness is the norm, the Missouri legislature created a statutory presumption that public records be open. Missouri’s Sunshine Law expressly provides that “[i]t is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law.” § 610.011.1. The statute further provides that statutes promoting open records “shall be *liberally construed* and their exceptions *strictly construed* to promote this public policy [of openness].” *Id.* (emphasis added).² *See also Great Rivers Environmental Law Center v. City of St. Peters*, 290 S.W.3d 732, 735 (Mo. App. E.D. 2009) (“Statutory exceptions allowing records to be closed are to be strictly construed.” (quoting Scroggins v. Missouri Dept. of Social Services, Children’s Division, 227 S.W.3d 498, 500 (Mo. App. W.D. 2007))).

Missouri courts have routinely found that for a public record to be closed, it must *clearly fit* within one of the statutory exceptions. *See City of Springfield v. Events Pub. Co.*, 951 S.W.2d 366, 371 (Mo. App. S.D. 1997) (“Public records must be presumed open to public inspection unless they contain information which clearly fits within one of the exemptions set out

² *See also* Professor Alfred S. Neely IV, 20A Mo. Prac. Administrative Practice & Procedure § 14:3 *Open Meetings-The “Sunshine” Law: Statement of Public Policy* (4th Ed.) (“The enunciated policy obviously favors openness. Meetings, records and votes are to be open unless the law provides to the contrary. In pursuit and furtherance of this policy, the General Assembly also indicated how it desires the judiciary to approach the statute—in a spirit of liberal construction where it demands openness and a spirit of strict construction where it permits nondisclosure. In the process, the General Assembly reduced the chances that courts will be confused or uncertain concerning the balance intended to be struck between openness and secrecy.”).

in § 610.021.” (quoting State ex rel. Mo. Local Gov’t Retirement Sys. v. Bill, 935 S.W.2d 659, 664 (Mo. App. W.D. 1996)). The Missouri Supreme Court has held with respect to public court records that “the presumption [in favor of open records] cannot be overcome absent a ***compelling justification*** that the records should be closed.” In re Transit Cas. Co., 43 S.W.3d at 301 (emphasis added).

In addition to carrying the burden of persuasion to show that a record clearly fits within a strictly-construed statutory exception, public government bodies are limited on what they can withhold. Missouri’s Sunshine Law expressly provides that “[i]f a public record contains material which is not exempt from disclosure as well as material which is exempt from disclosure, the public governmental body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.” § 610.024.1. *See also State ex rel. Missouri Local Government Retirement System v. Bill*, 935 S.W.2d 659, 664 (Mo. App. W.D. 1996) (“To the extent that the information Bill sought was contained in a record which also contained exempted information, LAGERS had an obligation to cull the requested information from the record and to disclose it.”).

Respondents have argued that Exhibit 6 and Exhibit 13 could be withheld under two statutory exceptions dealing with human resource matters. Section 610.021(3) provides that public records may be closed “to the extent they relate to . . . [h]iring, firing, disciplining or promoting of particular employees by a public governmental body when personal information about the employee is discussed or recorded.” Section 610.021(13) provides that public records may be closed “to the extent they relate to . . . [i]ndividually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment[.]”

The Southern District has explained that “[t]he purpose of [subpart (3)’s exception] is to encourage uninhibited discussion of the qualifications and conduct of one who acts on behalf of a public governmental body.” Paskon v. Salem Memorial Hosp. Dist., 806 S.W.2d 417, 423 (Mo. App. S.D. 1991). The term “personnel records” as used in subpart (13) was recently defined in Attorney General Opinion No. 93-2012 as follows:

The term “personnel” is defined as “a body of persons employed in some service.” *Webster’s Third New International Dictionary*, pg. 1687 (1993). “Personnel records” would presumably include those kept by a “personnel” or human resources staff or for the purposes usually assigned to or managed by such a staff. In that respect, “personnel” means “with respect to efficiency, training, service, and health,” or “the division of an organization concerned primarily with the selection, placement, and training of employees.” *Id.* Among “personnel files,” then, would be files relating to “efficiency, training, service, or health,” or to “selection, placement, and training.” They might also include records of an individual employee’s work and leave hours, contact information for the employee, social security numbers, information on marital status and dependents, and other information pertaining to the administration of benefits and the reporting and paying of taxes and garnishments.

Attorney General Opinion No. 93-2012, p. 6 (Feb. 6, 2012).

Respondents have failed to carry their burden of persuasion that either of these strictly-construed exceptions applies to Exhibit 6 or Exhibit 13. The withheld exhibits do not implicate the concerns justifying the human resource exceptions of subparts (3) and (13). The withheld exhibits were part of an investigation into the conduct of two elected City Council members. City Council members are not employees of the City and records regarding the performance of City Council members are not personnel records. *See Attorney General Opinion No. 77-92* (March 16, 1992) (“[E]lected city council members . . . are not ‘employees’ of the city.”); Attorney General Opinion No. 93-2012 (Feb. 6, 2012) (defining “personnel records”). The withheld exhibits were never intended to be a closed personnel record. The City Council made

this clear when it specifically stated in its contract with Mr. Loraine that the Report would be an open record under the Sunshine Law.

The withheld exhibits are documents that Missouri's Sunshine Law requires to be open. They concern how "government operates generally" and how "public funds are spent," State ex rel. Missouri Local Government Retirement System, 935 S.W.2d at 665. They squarely concern "the integrity and impartiality" of government and "bias and corruption in public service." In re Transit Cas. Co., 43 S.W.3d at 300-01. The withheld exhibits are not a "personnel record" because they are not the type of record "kept by a 'personnel' or human resources staff or for the purposes usually assigned to or managed by such a staff." AGO No. 93-2012, p. 6 (Feb. 6, 2012). The withheld exhibits do not relate to "efficiency, training, service, or health," or to "selection, placement, and training." Id. The withheld exhibits are not about human resource matters of any public employees.

PERMANENT WRIT OF MANDAMUS AND JUDGMENT

IN VIEW OF THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

- Respondents the City of Joplin and Barbara Hogelin are ordered to release the requested documents Exhibit 6 and Exhibit 13 to relator The Joplin Globe on or before 12:00 noon, Friday, April 4, 2014.
- The Court will address the issues cited in respondents' previously-filed motion to bifurcate concerning civil penalties, court costs, and attorneys' fees at a later date. All other issues raised by the pleadings are decided consistent with the foregoing adjudications.

- Correspondence from counsel for Respondents and Respondents' Exhibits submitted to this court in camera March 21, 2014, (included the zip drive which shall be marked as Respondents' Exhibit 13) and correspondence from counsel for Relators submitted to the court March 27, 2014, in camera, as confidential are ordered to be filed herein and maintained as a confidential part of this court's file.
- The Court expressly determines that there is no just reason for delay and that this judgment is final for purposes of appellate review pursuant to Rule 74.01(b).
- Execution shall issue.

Dated this 31st day of March, 2014.



A handwritten signature in black ink that reads "David B. Mouton". The signature is written in a cursive style and is positioned above a horizontal line.

The Honorable David B. Mouton