IN THE SUPREME COURT OF THE STATE OF MISSOURI

No. SC 98619

ELAD GROSS, APPELLANT,

vs.

MICHAEL PARSON, et al,
RESPONDENTS.

On Appeal from the Circuit Court of Cole County, Missouri

BRIEF OF AMICI CURIAE THE MISSOURI PRESS ASSOCIATION AND MISSOURI SUNSHINE COALITION

(Brief is being filed with consent of the parties to this matter)

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INTEREST OF AMICI CURIAE

This brief is being filed with the consent of all the parties.

Amicus Curiae The Missouri Press Association represents approximately 225 publications, 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 make the profession of journalism more beneficial to the people of Missouri. 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.

Its members cover news on a local, regional, statewide and national basis on a daily or weekly cycle and they are dependant in many cases to having access to records created and retained by public governmental bodies. When public bodies respond to those requests for access, they have a right under the law to charge certain fees for the costs incurred by the body for "research" and "copying," as set out in Section 610.026, R.S.Mo. The amount charged for access is a key factor in whether the requester, whether the media or the public, is capable of actually receiving the access they have requested. When the public governmental body demands payment of a significant cost for the access, it is the equivalent of denying access to the public.

Similarly, Amicus Curiae Missouri Sunshine Coalition is a Missouri not-for-profit entity formed in 2008 for the purpose of supporting citizens in exercising their rights to open government and access to public records and to promote and defend the exercise of these rights, all of which is premised under the Missouri Sunshine Law, chapter 610, R.S.Mo., which states that it 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. Members of this organization include private citizens, political activists, community volunteers and, of course, journalists.

When the Circuit Court's ruling stated in Section II of its Opinion that "Under the plain and ordinary meaning of the statute, the public governmental body is authorized to bill for the necessary attorney review time....", it created a substantial roadblock to access of

public records for the public, as well as the media.

And it is a roadblock that is not supported by the wording of the law which applies to this process. That is the issue which these Amici wish to focus on in their argument, to the exclusion of other issues that the Appellant may argue. These Amici believe a careful reading of the provisions in Chapter 610 make it clear that the Circuit Court erroneously decided who should pay the cost for the process of seeing legal advice in determining what part of an otherwise open record is closed from public inspection. These Amici further set out the basis for their position in this Brief for the Court's consideration of this extremely important issue.

STATEMENT OF FACTS

The Amici Curiae hereby adopt the statement of facts submitted by the Appellant Elad Gross in this matter.

POINT RELIED ON

The trial court erred in holding that a public governmental body is authorized to bill for the attorney review time in regard to responding to a request for access to and a copies of public records, because that is not a cost permitted to be charged under Section 610.026, R.S.Mo., in that the statute only provides for fees to be charged for "a paper copy ..., the hourly fee for duplicating time..., [and] research time."

Section 610.026.1, R.S.Mo.

ARGUMENT

> *Government ought to be all outside and no inside. . . . Everybody knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety*. U.S. President Woodrow Wilson, 1912.[1]

The trial court erred in holding that a public governmental body is authorized to bill for the attorney review time in regard to responding to a request for access to public records, because that is not a cost permitted to be charged under Section 610.026, R.S.Mo., in that the statute only provides for fees to be charged for "a paper copy ..., the hourly fee for duplicating time..., [and] research time."

Plaintiff Elad Gross began this case with a simple request for access to certain records from the Office of the Missouri Governor, seeking particularly e-mail and paper correspondence and other records retained in that office that related to the corporate entity "A New Missouri, Inc.," and individuals related to that entity. The corporate entity, its purpose and its activities are not relative to the argument these amici are making and neither is the purpose for which the Plaintiff sought those records. This brief relates solely to the response from the Governor's office to the requester and the citation as to the fees to be charged in response to that request made pursuant to the provisions in Chapter 610, R.S.Mo.[2],

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[1]Statement of Woodrow Wilson taken from his campaign book THE NEW FREEDOM, as cited on *http://www.freedominfo.org/resources/freedominfo-org-list-quotes-freedom-information/,* last visited December 23, 2020.

[2]All references to Statutes in this brief are to the Revised Statutes of Missouri (R.S.Mo., 2016, (Supp. 2017).)

that are commonly known as Missouri's "Sunshine Law."

Appellant Elad Gross no doubt sets out in detail the process used in his request for records and the various responses received. These Amici will not restate that information here. What is important is that even at the time these issues were first being discussed by the parties, the Appellant questioned the $40 per hour employee pay rate he was being charged for the records, noting that no clerical employee working for Respondent was being paid at that rate of pay (L.F. WD83061 Appeal Doc. 2 Page 6, Paragraph 21).

After the Respondent's answer was filed, Respondent filed its Motion for Judgment on the Pleadings (L.F., Doc. 19) and in that pleading made the argument that:

> The Governor's Office responded that it had located over 13,000 potentially responsive documents; estimated that over 90 hours of attorney time would be required to review responsive documents (particularly as the request included attorney communications that may be protected, requiring legal analysis and possible redaction); and notified Gross that he would be billed $40 per hour for research time, which is the hourly rate of the lowest paid attorney on the Governor's staff. (L.F., Doc. 19, Page 1).

Appellant responded to that Motion, arguing that the statute did not permit the Respondent to charge for attorney review time to separate open records from closed records, pointing out that the case of *White v. City of Ladue,* 422 S.W.3d 439 (Mo. Ct. App. 2013), which Respondent cited in support of their proposition, actually did *not* support Respondent's argument but supported the Appellant's position.

The Cole Circuit Court, in its Order dismissing the case, held:

> Section 610.026.1(1), provides that, "Research time required for fulfilling records requests may be charged at the actual cost of research time." Under the plain and ordinary meaning of the statute, the public governmental body is authorized to bill for the necessary attorney review time. Research, within the plain meaning of the word, includes efforts by an attorney to review documents for responsiveness, privilege, and work product. Also, as applied to these particular requests for documents, research time covers an attorney's research time because Gross' requests seek information that plainly contains attorney-client privileged materials and work product. (L.F., Doc. 25, Pages 4-5.)

The Amici believe that it is clear, under the provisions in Chapter 610, that a public body cannot charge the public for its cost in separating open from closed records, that such costs are not costs for "research," and that the Respondent's Motion for Judgment on the Pleadings should have been denied.

I. The language in Chapter 610 is to be liberally construed as a matter of public policy.

The Missouri Supreme Court has spoken clearly in the past to how the language in the statutes contained in Chapter 610 is to be interpreted. "It 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. Sections 601.010 to 610.028 shall be liberally construed and their exceptions strictly construed to promote this public policy." *Spradlin v. City of Fulton,* 982 S.W.2d 255, 259 (Mo. 1998).

The subject of interpretation of the language in Chapter 610 was further addressed by the Western District Court of Appeals in the matter of *Pulitzer Publishing Co. v. Missouri State Employees Retirement System,* 927 S.W.2d 477 (Mo. App. 1996).

> Statutory interpretation is a question of law. *Staley v. Missouri Director of Revenue,* 623 S.W.2d 246, 248 (Mo. banc 1981). When interpreting a statute, our primary role is to ascertain the intent of the legislature from the language used in the statute and, whenever possible, to give effect to that intent. *Sullivan v. Carlisle,* 851 S .W2d 510, 512 (Mo. banc 1993). In determining legislative intent, the words used in the statute are to be considered in their plain and ordinary meaning. *Trailiner Corp. v. Director of Revenue,* 783 S.W.2d 917, 920 (Mo. bane 1990). 'Further insight into the legislature's object can be gained by identifying the problems sought to be remedied and the circumstances and conditions existing at the time of enactment.' *Sermchief v. Gonzales,* 660 S.W.2d 683, 688 (Mo. banc 1983); *see also Schneider v. Missouri Division of Water Safety,* 748 S.W.2d 677,678 (Mo. banc 1988) ('The legislative intent and meaning of the words can, in many instances, be found in the general purposes of the legislative enactment.'). *Id.,* at 482.
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> All public governmental bodies have records. Section 610.010 (6) defines a "public

record" statutorily as "any record, whether written or electronically stored, retained by or of any public governmental body...." Case law supporting this point can be found in *Tribune Pub. Co. v. Curators of Univ. of Missouri,* 661 S.W.2d 575 (Mo. App. W.D. 1983), at 583, where the Court held, "Syllogistically, what constitutes a 'public record' neatly falls into place when the existence of a 'public governmental body' has been ascertained, as § 610.010(4) defines 'public record' as 'any record retained by or of any *public governmental body*.' " (Emphasis added by the court.)

Additionally, the statute is clear that there is a presumption that public records are open. (Section 610.011.1.) The exceptions to this presumption are to be strictly construed. (Section 610.011.1.)

Thus, an analysis of this matter begins with the principal that if a record is retained by a public governmental body, it is an open record and that exceptions to that statutory mandate are to be strictly construed.

II. If the records are public records, the public body should bear the cost of separating open from closed records pursuant to Section 610.024.

There are clearly two kinds of public records, under the statutory provisions in Chapter 610. The default, as set out above, is that all records are open records. The exception to that standard are records which are "closed" as that term is stated in the introductory paragraph to Section 610.021, which contains the "exceptions" to the law.

The Appellant, and these Amici, do not argue here that public governmental bodies may ***not*** close records. The law, specifically Section 610.021, is clear that public bodies do have a privilege to close certain records under those subparagraphs which authorize such closure if they so choose. It is important to note that this introductory language in Section 610.021 uses the phrase "is authorized to" in discussing such closure, indicating that closure is not mandatory on the part of the public body but is discretionary. This Court spoke of the "permissive closure" availability contained in Section 610.021 earlier, in its decision in *Guyer v. City of Kirkwood,* 38 S.W.3d 412 (Mo., 2001), at 414.[3]

[3]Further support for this analysis is found in *Strake v. Robinwood West Community Improvement District,* 473 S.W.3d 642, 645 (Mo., 2015); *State ex rel. City Of Springfield v.*

But one key factor in this analysis, at this point, is the issue of ***where*** responsibility lies for designating records as "open" or "closed." The method being used by Respondent is that a designation of records as "open" or "closed" occurred at the time the request for access was received. Such a process then leads the Appellate Court to the analysis of what is included in costs of "research" and the holdings that the requester must pay for those legal fees in making that determination.

The Court of Appeals, in its decision, in particular in its analysis of Subsection (1) (L.F. Document 25, Page 11, et seq.), discusses its analysis of the definition of the term "search" and the term "research." These Amici do not dispute the definitions the Appellate Court cited. But these Amici believe the Court was wrong in its conclusion that "research," which means the "studious inquiry or examination" of documents, meant that process included the Governor's Office engaging in legal analysis of records at the time it had to determine what to produce to the Appellant in response to his request.

What is key to making this analysis is the consideration of the timing of these activities. And what the Appellate Court's opinion disregards is the duty imposed on public bodies by Section 610.024. The obligations contained in that section of the law must be considered in analyzing the surrounding statutes and the process of providing for public access of its records.

Section 610.023 mandates that each public body "shall made available for inspection and copying by the public of that body's public records." And the term "public records" is a defined term in Section 610.010, where the definition specifies it as "any record, whether written or electronically stored, retained by or of any public governmental body...."

Clearly, then, a public governmental body's "public records" are many. But those records are documents which already exist, because they are "retained." But at the time those records are being created, they are governed by the further instructions about public records which may be found in Section 610.024. Subsection 2 of that statute says, "When designing a public record, a public governmental body shall, to the extent practicable, facilitate a separation of exempt from nonexempt information." The language there needs no dictionary analysis – it is simple. A record ideally is designed, if possible, to facilitate "exempt" (or

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Brown, 181 S.W.3d 219, 222 (Mo.App. S.D., 2005); and *Laut v. City of Arnold,* 417 S.W.3d 315, 319 (Mo.App. E.D., 2013).

"closed") from "nonexempt" ("open") information. The term "designed" cannot be talking about a process that occurs *after* the record is created and exists. It can only be interpreted to be talking about a point in time when the record is being created. One does not create a pattern of elements in a finished product – it is, rather, a term used to describe how something is put together.[4] Subsection 2 is instructing how a public record should be put together at the time it is created.

Subsection 1 specifically deals with handling a record which contains both open and closed ("exempt" and "nonexempt") material. And it is very clear as to has the responsibility for that separation process. "....[T]he public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." And nowhere in that sentence does it say, or even infer, that the person making the request pays for this process. And it doesn't state or infer that the process specifically identified there is "research" as that term is used in Section 610.026. The separation process is part of the statute discussing the creation of public records. It is not a part of the subsequent statute setting out the process for obtaining copies of public records.

Case law sets out basic principles for statutory interpretation. "...[W]e are mindful of the principle which underlies all rules of statutory construction, namely, that we should first seek the intention of the legislature, and if possible effectuate that intention. In arriving at the intention of the legislature the objectives of the enactment are to be considered. It is equally fundamental that in interpreting a statute we must place a construction thereon which is reasonable and logical and will give meaning thereto." (Internal citations omitted.) *Globe-Democrat Pub. Co. v. Industrial Commission,* 301 S.W.2d 846, 851–52 (Mo.App. 1957).

Here, Section 610.024 says that 1) the public body must separate the exempt from nonexempt materials, and then, 2) that the public body must make the nonexempt material available for examination and copying. Nowhere is the tern "research" used or incorporated into this statute as part of that process. The term "research" is used only in the subsequent

[4]For example, Black's Law Dictionary defines the term "design" in definition 3 as "The pattern or configuration of elements in something...." DESIGN, BLACK'S LAW DICTIONARY (11th ed. 2019).

statute (610.026) in terms of making copies of the records being produced, records which, according to Section 610.024, have already been separated so that only open records are being made available to the public.

Again, the Amici note that Missouri's Supreme Court has mandated that in the process of interpreting a statute, words should be given their "plain and ordinary" meaning. "The primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning.... Statutory construction should not be hyper technical but instead should be reasonable, logical, and should give meaning to the statutes....." *In re Boland,* 155 S.W.3d 65, 67 (Mo. 2005) (Internal citations omitted). "Our primary goal is to ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms used .... Under traditional rules of construction, the word's dictionary definition supplies its plain and ordinary meaning...." *Motton v. Outsource Intl.*, 77 S.W.3d 669, 673 (Mo. App. E.D. 2002) (Internal citations omitted).

The logical way to read Section 610.024.1 is that it states that it is the duty of the public body to separate "exempt" from "nonexempt" material in public records. This is in harmony with the provisions in Section 610.022 (6) that require a public governmental body to take a vote to close certain records. The body is responsible for identifying closed records from open records at the time when the records are created or when that vote is taken pursuant to Section 610.022 (6) and thereafter is mandated to "separate" the closed records from the open records as stated in Section 610.024.1. before it proceeds to make the open records available to the public. Furthermore, the public body is told in Section 610.024 "to the extent practicable," to facilitate the separation of exempt from nonexempt information. When the public body advises that nonexempt materials will not be made available to the public, upon request, it is to describe the material that is exempted unless doing so would reveal its contents, according to that Section.

But these Amici note that there is not a single word in this section of the law imposing any duty on the public to pay for that process.

So what does Section 610.026 mean when it talks about charging for "research time?"[5] These Amici believe a more reasonable interpretation of that language is that the

[5]I.e: " *Research* time required for fulfilling records requests may be charged at the

process of pulling records is, actually, a two-step process, first searching out a broad group of records potentially related to a request for access, and then researching which actual records are responsive to the request made by the requester. For example, a request for "minutes" of a particular meeting will lead first to the location where minutes are kept, and then additional time to locate the specific set of minutes being requested by the member of the public.

The phrase "research time" appears to have only been discussed in nine Missouri cases.[6] And of those nine, the only cases that touch on the Sunshine Law are *White v. City of Ladue,* 422 S.W. 3d 439 (Mo. App. E.D. 2013) and *State ex rel. Missouri Local Gov't Ret. Sys. v Bill,* 935 S.W. 2d 659 (Mo. App. W.D. 1996). In the *White* case, involving a former chief of police who brought claims against the city for wrongful discharge in violation of public policy and for an alleged violation of Sunshine Law, the trial court "...found as a matter of 'first impression' that the City committed a violation of the Sunshine Law by requesting payment for attorney review time..." *White,* at 452. The appellate court did not

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actual cost of *research* time. Based on the scope of the request, the public governmental body shall produce the copies using employees of the body that result in the lowest amount of charges for search, *research*, and duplication time...." (Emphasis added.)

[6]The nine cases located by Plaintiff's counsel include the following: *U.S. ex rel. Kimball v. Cathedral Rock Corp.,* 4:03CV1090HEA, 2010 WL 147810 (E.D. Mo. Jan. 11, 2010); *Ladies Ctr., Nebraska, Inc. v. Thone,* 645 F.2d 645 (8th Cir. 1981); *Neufeld v. Searle Laboratories,* 84-0932-CV-9, 1987 WL 19228 (W.D. Mo. Oct. 16, 1987), rev'd, 884 F.2d 335 (8th Cir. 1989); *Conroy v. Aniskoff,* 507 U.S. 511, 113 S. Ct. 1562, 123 L. Ed. 2d 229 (1993); *Thirty & 141, LP v. Lowe's Home Centers, Inc.,* 4:06 CV 01781SNL, 2008 WL 1995344 (E.D. Mo. May 6, 2008); *Knight v. Krauser,* 15-CV-0171-FJG, 2015 WL 3473157 (W.D.Mo. June 2, 2015); *Carter v. Stendeback,* 482 S.W.2d 534 (Mo. App 1972), *White v. City of Ladue,* 422 SW.3d 439 (Mo. App. E.D. 2013), and *State ex rel. Missouri Local Gov't Ret. Sys. v. Bill,* 935 S.W.2d 659 (Mo. App. W.D. 1996).

address that definition because it was not pertinent to the foundation on which its holding was based, but it is important to note that the appellate decision, in footnote 10 attached to that sentence in its holding, did state the following:

> We note that neither White nor the City has challenged the trial court's ruling that attorney's fees may not be charged as research time under the Sunshine Law. *The St. Louis Post-Dispatch* has filed an amicus curiae brief with this Court, urging that "allowing parties to charge for costs incurred for attorneys reviewing Sunshine Law [requests] ... undermines the purpose of the statute." However, as this issue is not raised in the instant appeal, we decline to address it. *See Robert Williams & Co., Inc. v. State Tax Comm'n of Missouri,* 498 S.W.2d 527, 530 (Mo. banc 1973) ("Amicus curiae cannot inject new issues into the case and the court will not pass on contentions urged by an amicus curiae but not presented by the parties."). *White,* at 452.

In addition, the Amici point out to the Court that in the older decision, i.e. the *State ex rel. Missouri Local Govt Ret. Sys.* decision, the appellate court was clear in its holding on this issue as to who had this obligation. "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. See *Oregon County R-IV School District v. LeMon,* 739 S.W.2d 553, 556 (Mo.App.1987)." *Id.*, at 664.

And specifically, in the language in Section 610.026.1 (2) relating to copies of records maintained on computer facilities, such as is the case in some of the records relative to this request, the fees that may be charged pursuant to that statute are limited solely to "the cost of copies, staff time... required for making copies and programming, if necessary, and the cost of the disk, tape, or other medium used for the duplication." This is distinctly different than the fees to be charged for to paper copies, as Subsection 610.026.1 (1) specifically references charging for the hourly fee for duplicating time based upon the hourly rate of pay for the clerical staff of the public body making the copy and a per-page charge for a paper copy. Of interest and note is the fact that ONLY this subsection, and NOT the subsection related to electronic copies, includes in the list of chargeable fees the cost of "research time." Perhaps that is because that the research portion of the search is much easier on a computer than it is when dealing paper records.

These Amici argue that the *Lagers* case is clear, the argument of the amicus cited in

the *White* case is a correct argument, and that reading the language in Section 610.026.1 (1), especially when read alongside the language in Section 610.026.1 (2), can only lead to the conclusion that "research time" means the time required to locate specific records that are responsive to the specific record request and cannot be held to include time attributable to the public body (and/or its attorneys) in performing their required duty of separating "exempt" from "nonexempt" records, which is a cost that is attributable to the public body.

Research is a cost that can be charged, based upon the language in Section 610.026.1 (1) but in order to harmonize that statute with Section 610.024, clearly the term "research" cannot mean the separation of"exempt" from "nonexempt" in the original separation process. That is not the language contained in Section 610.024 and is not specified in Section 610.026.1(1). Instead, it is absolutely clear in Section 610.024 that the determination of what records are "privileged" is the responsibility solely of the public body.

III. Conclusion

For the reasons set out above, these Amici respectfully urge this Court to reverse the Judgment of the trial court, to hold that the cost of separating "exempt" from "nonexempt" records should be borne by the public governmental body and not charged as "research time" against the person requesting access to the records under Section 610.026, and for such other and further relief as this Court deems just and proper in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on this 23rd day of December, 2020, a copy of the foregoing document was served electronically upon the counsel for Appellant and Respondent pursuant to Supreme Court Rule 105.08 via the Missouri eFiling system and that the original pleading was signed by the attorney for the Amici.

Further, the undersigned certifies that the brief above contains 5,082 words (no lines in the brief are single spaced), has been scanned for viruses and is virus-free, and complies with the provisions contained in Supreme Court Rule 84.06 (b).

/s/ Jean Maneke
Jean Maneke