IN THE SUPREME COURT OF MISSOURI

No. SC98619

Elad Gross,
Appellant,

v.

Michael Parson, et al.
Respondents.

Appeal from the 19th Judicial Circuit Court of Missouri
The Honorable Judge Patricia Joyce Presiding

APPELLANT'S SUBSTITUTE REPLY BRIEF

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I. Government Respondents May Not Charge Fees Associated with an Attorney to Members of the Public Seeking Public Records under Missouri's Sunshine Law.

The primary question of law before this Court is whether government entities in Missouri may charge fees associated with an attorney to people requesting public records under Missouri's Sunshine Law. The answer to that question has yet to be provided by a court of appeal of this state. The statute does not authorize the charging of attorney's fees, and no court until the trial court in the instant case has ever supported the charging of any fees associated with an attorney to requesters under the Sunshine Law. This Court should uphold Missouri's Sunshine Law, prohibit the government from charging members of the public attorney's fees for access to public records, and enforce the legislature's stated public policy of transparency in government.

A. The Sunshine Law Does Not Explicitly Authorize the Government to Charge Fees for an Attorney.

The Sunshine Law does not include an explicit provision authorizing the charging of attorney's fees. Government Respondents are asking this Court to expand the definition of "research time" in RSMo. § 610.026.1(1) to include attorney review time. There are several problems with the

government's recommendation. First, the plain language of Missouri's Sunshine Law does not authorize the government to charge fees associated with an attorney. Second, the Sunshine Law must be construed liberally in favor of public access to public records, not in favor of a government entity seeking to prevent public access, and any reasonable statutory construction does not authorize the charging of attorney's fees. Third, the government's unsupported position would drastically reduce public access to public records by dramatically increasing costs on the public, an outcome opposed by the public policy annunciated in the Sunshine Law. Finally, the vast majority of American jurisdictions require an express statutory provision authorizing the government to charge for an attorney to review records in order to protect public access to public records. The trial court's ruling should be reversed.

1. The Plain Language of Missouri's Sunshine Law Does Not Authorize Charges Associated with an Attorney.

First, the plain language of Missouri's Sunshine Law does not support the charging of attorney's fees. Government Respondents must be able to point to some statutory provision expressly authorizing the charging of the fees they are attempting to assess Appellant here. *See R.L. Polk & Co. v. Missouri Dep't of Revenue*, 309 S.W.3d 881, 885-86 (Mo. Ct. App. 2010) (requiring express authorization of the particular fees assessed by the government under the Sunshine Law). No express authorization exists.

Government Respondents only point to RSMo. § 610.026.1(1) and the authorization to charge for "research time." The terms "attorney's fees", "attorney", "review", "redact", and a slew of other related terms do not appear in that section. *Id.* The statute expressly authorizes fees for other listed professionals: RSMo. § 610.026 authorizes charges for "clerical staff," "programming," and "trained personnel required to duplicate… maps, blueprints, or plats." Just a section later, attorney's fees are expressly authorized in the Sunshine Law at RSMo. §§ 610.027.3-4 for plaintiffs succeeding in their suits against government entities. The legislature clearly knew how to authorize attorney's fees, and in fact did for other situations. The legislature never authorized the government to charge attorney's fees. The plain language of the statute does not support government Respondents' contention that they are authorized to charge attorney's fees.

2. Statutory Construction Prohibits the Government from Charging Fees Associated with an Attorney.

Second, statutory construction does not support the charging of attorney's fees. Missouri's Sunshine Law must be construed liberally to benefit the public, not the government. RSMo. § 610.011 requires the Sunshine Law's public-records-access provisions to be "liberally construed and their exceptions strictly construed." "Under the Sunshine Law, records of public governmental bodies shall be open to the public unless otherwise

provided by law." *Nat'l Council for Teachers Quality, Inc. v. Curators of Univ. of Missouri*, 446 S.W.3d 723, 725 (Mo. Ct. App. 2014). Openness and public access to public records is the default in Missouri. *See id.*; *News–Press and Gazette Co. v. Cathcart,* 974 S.W.2d 576, 578 (Mo. Ct. App. 1998).

Charging attorney's fees restricts public access to public records, and any fee authorizations must be strictly construed. *See Deaton v. Kidd*, 932 S.W.2d 804, 807 (Mo. Ct. App. 1996); *R.L. Polk & Co.*, 309 S.W.3d at 885-86. Government Respondents again only point to RSMo. § 610.026.1(1) and ask this Court to liberally read an authorization to charge attorney's fees into the express authorization to charge for "research time." Government Respondents are not entitled to a liberal construction of "research time." In fact, the opposite is true: The authorization of charges for research time must be strictly construed.

The Court must also look to the rest of the statutory framework to determine if the government Respondents may charge attorney's fees. *R.L. Polk & Co.*, 309 S.W.3d at 885 (finding that RSMo. § 610.026.1(1) expressly authorizes a per record fee for copies while RSMo. § 610.026.1(2) does not). The fact that RSMo. § 610.026 authorizes charges for professional staff and that RSMo. § 610.027 authorizes charges for attorneys also supports the need for some express authorization for the government to charge attorney's fees. Like in *R.L. Polk & Co.*, the absence of express authorization in one part of

the statute and the presence of it in another should be determinative: Respondents may not charge Appellant attorney's fees. *See id.*

3. Public Policy Interests Weigh in Favor of Prohibiting the Government from Charging Attorney's Fees.

The public interest and public policy do not support the charging of attorney's fees. RSMo. § 610.011 clearly announces: "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 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed to promote this public policy." Missouri courts have noted the immense restriction charging attorney's fees would have on public access to public records in *White v. City of Ladue*, 422 S.W.3d 439, 452 n.10 (Mo. Ct. App. 2013). While government Respondents attempt to minimize the hourly charges in this case, permitting the government to charge attorney's fees would also permit much higher charges than the ones assessed by Respondents, especially when the government hires outside counsel, as was the case in *White v. City of Ladue*. *Id.* at 452-53. Respondents' recommendations would effectively eliminate public access to public records, abrogate the public policy purpose of the Sunshine Law, and leave the independence of a free press to the whims of the government. Public policy clearly does not support the charging of attorney's fees.

4. The Vast Majority of Other Jurisdictions Require an Express Authorization to Charge for Attorney Review Time.

Outside of Missouri, other jurisdictions overwhelmingly require specific express authorizations for government entities to charge for attorney review time. It appears that only five states' courts have interpreted their public records laws to allow government entities to charge fees not explicitly authorized in statute.[1] On the other hand, at least 39 states, the federal government, and Washington, D.C. do not permit the government to charge fees not explicitly included in the statute.[2] For example, Alabama permits

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[1] These states are: **Colorado** (Colo. Rev. Stat. Ann. § 24-72-205(6)(a); *Mountain-Plains Inv. Corp. v. Parker Jordan Metro. Dist.*, 312 P.3d 260, 268 (Co. Ct. App. 2013)); **Kansas** (*Data Tree, LLC v. Meek*, 109 P.3d 1226, 1239 (Kan. 2005)); **Rhode Island** (*Direct Action for Rights & Equal. v. Gannon*, 819 A.2d 651, 661 (R.I. 2003)); **Utah** (*Bryner v. Canyons Sch. Dist.*, 351 P.3d 852, 860 (Utah Ct. App. 2015); and **Virginia** (*Am. Tradition Inst. V. Rector & Visitors of Univ. of Virginia*, 756 S.E.2d 435, 443 (Va. 2014). However, Utah arguably could be excluded from this list. Utah's statute permits the government to charge records requesters if it needs to "tailor information" provided. (Utah Code Ann. § 63G-2-201(8), 203(1)-(2)). The Utah Court of Appeals has held that the physical act of redacting a video is a form of tailoring information. *Bryner*, 351 P.3d at 860.

[2] These states are: **Alabama** (Ala. Code § 36-12-41; Ala. Op. Att'y Gen. No. 2008-073 (Apr. 21, 2008)); **Alaska** (Alaska Stat. Ann. § 40.25.110(b)-(c); *Fuller v. City of Homer*, 113 P.3d 659, 666 (Alaska 2005)); **Arizona** (Ariz. Rev. Stat. Ann. § 39-121.01.D.1; 1986 Ariz. Op. Att'y Gen. 103 (1986); *Hanania v. City of Tucson*, 624 P.2d 332, 333 (Ariz. Ct. App. 1980)); **Arkansas** (Ark. Code Ann. § 25-19-105(d)(3)(A)(i)); **California** (Cal. Gov't Code § 6253(b); *N. Cty. Parents Org. v. Dep't of Educ.*, 28 Cal. Rptr. 2d 359 (Cal. Ct. App. 1994)); **Connecticut** (Conn. Gen. Stat. Ann. § 1-212(b)(1)); **Delaware** (Del. Code Ann. tit. 29 § 10003(m)(2)); **Florida** (Fla. Stat. Ann. §

government entities to charge "legal fees", but that phrase is construed to mean permissible fees, not fees for an attorney to review records. Ala. Code § 36-12-41; Ala. Op. Att'y Gen. No. 2008-073 (Apr. 21, 2008). In Florida, a broad provision permits government entities to charge a special service fee, which at least one court held includes allowing charges for "research." Fla. Stat. Ann. § 119.07(4)(d); *Carden v. Chief of Police, City of Clewiston Police*

119.07(4)(d); *Carden v. Chief of Police, City of Clewiston Police Dep't*, 696 So. 2d 772, 773 (Fla. Dist. Ct. App. 1996)); **Georgia** (Ga. Code Ann. § 50-18-71; *Trammell v. Martin*, 408 S.E.2d 477, 479 (Ga. Ct. App. 1991)); **Hawaii** (Haw. Rev. Stat. Ann. § 92-21); **Idaho** (Idaho Code Ann. § 74-102); **Illinois** (5 Ill. Comp. Stat. Ann. 140/6); **Indiana** (Ind. Code Ann. § 5-14-3-8(b)); **Iowa** (*Rathmann v. Bd. Of Directors of Davenport Cmty. Sch. Dist.*, 580 N.W.2d 773, 777 (Iowa 1998)); **Kentucky** (Ky. Rev. Stat. Ann. § 61.874(3)); **Louisiana** (La. Stat. Ann. § 44:32.C(3)); **Maine** (Me. Rev. Stat. tit. 1 § 408-A.8); **Maryland** (Md. Gen. Provis. § 4-206(b)); **Massachusetts** (950 Mass. Code Regs. 32.07(2)(d)); **Michigan** (Mich. Comp. Laws Ann. § 15.234); **Minnesota** (Minn. Stat. Ann. § 13.03); **Mississippi** (Miss. Code. Ann. § 25-61-5); **Nebraska** (Neb. Rev. Stat. Ann. § 84-712(3)(c)); **New Jersey** (N.J. Stat. Ann. § 47:1A-5.b(1)); **New Mexico** (N.M. Stat. Ann. §14-2-9.C(6)); **New York** (*Time Warner Cable News NY1 v. New York City Police Dep't*, 36 N.Y.S.3d 579, 596-97 (N.Y. Sup. Ct. 2016)); **North Dakota** (N.D. Cent. Code Ann. § 44-04-18.2); **Ohio** (*State ex rel. The Warren Newspapers, Inc. v. Hutson*, 640 N.E.2d 174, 180 (Ohio 1994)); **Oklahoma** (Okla. Stat. Ann. tit. 51 § 24A.5.4); **Oregon** (Or. Rev. Stat. Ann. § 192.324(4)); **Pennsylvania** (65 Pa. Stat. Ann. § 67.1307(g)); **South Carolina** (S.C. Code Ann. § 30-4-30(B)); **Tennessee** (Tenn. Code Ann. § 10-7-506(c)(1); Tenn. Op. Att'y Gen. No. 02-065 (May 17, 2002)); **Texas** (Tex. Gov't Code Ann. § 552.261(a); Tex. Atty. Gen. Op. No. JM-0114 (1984)); **Vermont** (*Doyle v. City of Burlington Police Dep't*, 219 A.3d 326 (Vt. 2019)); **Washington** (Wash. Att'y Gen. Op. 1991 No. 6 (1991)); **West Virginia** (W. Va. Code Ann. § 29B-1-3(e)); and **Wisconsin** (*Milwaukee Journal Sentinel v. City of Milwaukee*, 815 N.W.2d 367, 374 (Wis. 2012)), along with the **federal government** (5 U.S.C. § 552(a)(4)(A)) and **Washington, D.C.** (D.C. Code Ann. § 2-532(b-1)-(b-2)).

Dep't, 696 So. 2d 772, 773 (Fla. Dist. Ct. App. 1996). However, "research" was interpreted to mean a deep and labor-intensive search, not attorney review. *Carden*, 696 So. 2d at 773. Georgia explicitly allows a charge for redaction, but those charges cannot include the legal review an attorney would conduct to determine what to redact. Ga. Code Ann. § 50-18-71; *Trammell v. Martin*, 408 S.E.2d 477, 479 (Ga. Ct. App. 1991). Ohio's statute permits charging records requesters at cost, but that charge cannot include labor costs undertaken by the state. *State ex rel. The Warren Newspapers, Inc. v. Hutson*, 640 N.E.2d 174, 180 (Ohio 1994). Texas's statute also includes broad language, but the Texas Attorney General's Office opined that any cost a government entity wanted to charge must be expressly included in statute. Tex. Gov't Code Ann. § 552.261(a); Tex. Atty. Gen. Op. No. JM-0114 (1984). Overwhelmingly, jurisdictions in the United States of America do not authorize government entities to charge members of the public fees to access public records unless those fees are clearly and explicitly authorized by statute.

A Texas Attorney General opinion explains why courts should narrowly construe the fee authorizations in public records statutes.

> A governmental entity employs individuals, and compensates them, to assist it in discharging its lawful duties and functions. Among these duties and functions is the obligation to provide the public with that to which it is entitled by law. Where the law in question is the Open Records Act, the "duty" is to provide

> information collected, assembled, or maintained by the entity to members of the public who request it and are legally entitled to it.
>
> Nothing short of an explicit declaration would convince us that the legislature intended that governmental entities be able to impose a separate charge to the public for the time spent by their employees in compiling subsection (a) records and making them available to the public. As noted, a governmental employee who provides public records to the public is simply discharging one of his primary duties as a governmental employee. He is paid by the entity for discharging such duties. Absent express statutory authority, we do not believe that entities may in effect require the public to reimburse them for the time spent by their employees in providing the public with a service to which it is legally entitled. If the service provided by the entity is required by law to be provided, we believe that the costs incurred in providing the service must be borne by the entity itself. The entity may pass these costs along to the public only if it is expressly authorized to do so.
>
> Tex. Atty. Gen. Op. No. JM-0114 at p. 3 (1984)

Likewise, in Missouri, government entities have a responsibility to provide public records to the public. RSMo. § 610.024(1) imposes an additional duty on Missouri government entities to separate exempt from nonexempt records. *See St. Louis Police Officers' Ass'n v. Bd. of Police Comm'rs of City of St. Louis*, 259 S.W.3d 526, 528 (Mo. 2008) ("Generally the use of the word 'shall' connotes a mandatory duty."). The Sunshine Law does not make separation of exempt and nonexempt material conditional on a request; government entities must obey the law and do it. RSMo. § 610.024(1). Taxpayer money is already allocated for this very purpose.

The Texas Attorney General provided further reasoning for preventing a government entity from charging members of the public to redact public

records without an express authorization, especially when the government is not required to withhold the records.

> But where the employee time is spent in deleting material from the requested information – which, of course, the governmental entity is not obligated to do except where section 3(a)(1) information is involved – it cannot be argued that the requestor benefits in any way from the expenditure of time. To conclude that a governmental body may charge a requestor for time spent by its employees in carrying out its decision to withhold material from the requestor is to conclude that it may charge the requestor for information that he does not get. Under this conclusion, the more the government decides to withhold, the more the requestor will have to pay. We do not believe this is a reasonable result.
> Tex. Atty. Gen. Op. No. JM-0114 p. 4 (1984) (emphasis in original)

Respondents here charged Appellant for reviewing records, allegedly because they may implicate attorney-client privilege. Missouri's Sunshine Law authorizes the government to close "any confidential or privileged communications between a public governmental body or its representatives and its attorneys" if it so chooses. RSMo. § 610.021(1). But the records requested by Appellant were not communications involving any of the public governmental body's attorneys. Some of the individuals may have been attorneys, but none represented the Office of the Governor. Respondents are seeking to charge Appellant a fee without express authorization to do so for review that Appellant does not want and does not appear to be authorized by law. Under Respondents' unreasonable interpretation, any government entity could charge any member of the public for attorney review time for any record,

essentially eliminating most of the public from accessing public records the government does not wish the public to see, negating the very purpose the Sunshine Law was supposed to fulfill.

Authorizing the government to charge the public fees to access public records inevitably limits access. This is why courts should avoid finding such authorizations where they are not explicitly included. The People of Missouri are entitled to set limits on government power and establish the responsibilities that come with having that power. The Sunshine Law is an example of both.

Government Respondents request that this Court discard longstanding precedent and the wide practice of requiring specific express authorizations of chargeable fees under the Sunshine Law along with strict construction of barriers to public access to public records. Their request would wrongly and irreparably damage the Sunshine Law. Therefore, this Court should reject Respondents' arguments, reverse the decision of the trial court, and permit the case to continue.

B. Caselaw Does Not Authorize the Government to Charge Attorney's Fees.

Until the trial court here, no court has authorized the government to charge attorney's fees under the Sunshine Law. In fact, every previous case has found that the government may not charge such fees. *Swaine v.*

McCulloch, No. 15SL-CC03842 (St. Louis County Circuit Court, Jan. 4, 2017); *White v. City of Ladue*, 422 S.W.3d 439, 452 n.10 (Mo. Ct. App. 2013) (ruling at the trial court level). Caselaw does not support government Respondents.

Respondents have mischaracterized *White v. City of Ladue*. The trial court there explicitly found that the government could not charge for attorney review time for records requested under the Sunshine Law. *Id.* at 452 n.10. That ruling by the trial court was so uncontroversial that neither party appealed that ruling. *Id.* The trial court ruling in *White* is clear: Government entities cannot charge for attorney review time under the Sunshine Law. The appellate court was also clear: It did not see a need to rule on this uncontroversial finding by the trial court.

The government Respondents here confuse the rest of *White's* ruling as if it supports their argument. Nowhere in the case does the Court authorize a charge of $250 per hour for attorney review time. *Id.* The discussion around fees is highly limited and is only relevant to whether the government purposefully and knowingly violated the Sunshine Law. *Id.* at 452-53. In *White*, the government contracted with outside counsel at the rate of $150 per hour. *Id.* The government charged $250 per hour to a member of the public seeking records under the Sunshine Law for an attorney to review records. *Id.* At the trial level, the court found that charging these fees was impermissible under the Sunshine Law. *Id.* at 452 n.10. On appeal, the

parties already agreed that any charges for attorney review time was impermissible. *Id.* at 452 n.10. But a question remained: When the government impermissibly charged the member of the public, did charging more than $150 per hour for an attorney – the rate the attorney was supposed to be paid by contract – constitute a knowing or purposeful violation of the Sunshine Law because the charge was for more than the actual cost? *Id.* at 452-53. The appellate court found that the government acted in good faith in charging $250 per hour, but the court did not find that those charges were permissible. No reading of *White* authorizes the charging of attorney's fees for requests under the Sunshine Law. The trial court's ruling stood for the exact opposite, and the appellate court noted an amicus brief cautioning against charging attorney's fees. *Id.* at 452 n.10.

White is a perfect warning of the devastating consequences the government Respondents' reasoning would bring. If this Court adopts Respondents' unsupported position, members of the public could be charged high hourly rates to access public records. Respondents argue that they should have been able to charge Appellant upwards of $22,500 (at a $250 per hour rate) for public records related to a corruption scheme exposed by the Missouri House of Representatives. According to the government, the only reason the cost was lower – a little over $3,600 (at a $40 per hour rate) – was out of the mercy of government Respondents. Government Respondents in

effect argue that public records should be accessible only to the wealthy few at the government's sole discretion. Missouri's Sunshine Law stands for the opposite: Public records should be accessible to the public.

Respondents' argument has no basis in the law or even in necessity. The State Auditor's Office publishes their responses to Sunshine requests online for the public to see at no cost. *Office of Missouri State Auditor*, "Sunshine Law Postings", available online at https://app.auditor.mo.gov/sunshinepostings/index.aspx. In *Nat'l Council for Teachers Quality, Inc. v. Curators of Univ. of Missouri*, the Court rejected the government's argument that it would be too burdensome to turn over specific public records because the government would need to hire specialized attorneys to review records to be released under the Sunshine Law. 446 S.W.3d at 728–29. The government has a responsibility to abide by Missouri's Sunshine Law, and the legislature gave government entities the responsibility to pay for lawyers to examine any records needing review. Respondents' arguments lack support and would greatly harm the public.

No case permits the government to charge attorney's fees to members of the public seeking public records. This case should not be the first. The Court should reject Respondents' arguments, reverse the decision of the trial court, and permit the case to continue.

II. Appellant Properly Preserved his Points on Appeal

Respondents incorrectly assert that Appellant has brought new claims or legal theories on appeal on Points V, VIII, IX, and X. All of these issues were included in the Petition and are properly before this Court.

Point V asserts that Respondents have the burden to explain why they redacted documents. The Petition asserted facts and allegations of improper redaction at paragraphs 33-35, 106, and 107. (LF 2). Appellant's Response also asserted this same issue on pages 7-8. (LF 20). Moreover, this legal burden is imposed by the statute itself. RSMo. § 610.027.2; *Spradlin v. City of Fulton*, 982 S.W.2d 255, 259-60 (Mo. 1998). The trial court did not have the option of ignoring part of the law, and Point V is properly before the Court.

Points VIII and IX assert that Respondents purposely violated the Sunshine Law. So did the Petition at paragraphs 57, 83-92, 98, 116-23, and 129. (LF 2). Appellant also asserted that Respondents charged Appellant at a different rate than other requesters under the Sunshine Law. (LF 2, ¶¶ 15, 43-47)[3]. Appellant's Response also brought this same issue to the trial court's

[3] Respondents point out that Appellant included a typographical error in the initial Complaint. Despite the error, the correct exhibit was properly attached to the Petition and is in the Legal File at LF 13, p. 6. That exhibit is an email and is evidence that Appellant was charged a different rate by the Governor's Office than other requesters under the Sunshine Law.

attention at pages 8-9. (LF 20). Points VIII and IX are properly before the Court.

Point X asserts that Respondents acted arbitrarily and capriciously. So did the Petition at paragraphs 42 and 73. (LF 2). This was again asserted by Appellant in his Response to Defendants' Motion for Judgment on the Pleadings at page 5. (LF 20). Point X is properly before the Court.

Repeatedly, Respondents attempt to argue the facts of the case rather than the application of the law. At the trial level, the facts should have been taken in the light most favorable to Appellant, as is true in this Court. *See City of Dardenne Prairie v. Adams Concrete & Masonry, LLC*, 529 S.W.3d 12, 17 (Mo. Ct. App. 2017). As a matter of law, the Court cannot make inferences against Appellant, and Appellant has asserted sufficient facts to state claims against Respondents. This case requires an evidentiary hearing to be resolved, and this Court should reverse the ruling of the trial court and allow the case to continue.

CONCLUSION

The trial court erred in dismissing Appellant's case. Appellant properly pled his case, and Missouri's Sunshine Law prohibits Respondents from charging Appellant attorneys' fees for access to public records.

For all of the reasons contained in this reply brief and in Appellant's previous brief, Appellant requests the Court reverse the decision of the trial court and remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that on the 22nd day of January, 2021, the foregoing **Appellant's Substitute Reply Brief** was filed and served electronically via Missouri's Case.net system on all counsel of record.

I further certify that the foregoing complies with the requirements contained in Rule 84.06(b) and the limitations contained in Special Rule 360 in that the brief contains 5,168 words.

/s/Elad Gross
Elad Gross
Attorney at Law

CERTIFICATE OF ORIGINAL SIGNATURE

I hereby certify that on this 22nd day of January, 2021, the original of the foregoing document was signed by the attorney of record.

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