

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
19th JUDICIAL CIRCUIT

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|------------------------------|---|----------------|
| MISSOURI ALLIANCE |) | |
| FOR FREEDOM, Inc. |) | Case No. _____ |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| MISSOURI AUDITOR |) | |
| NICOLE GALLOWAY |) | |
| Serve: |) | |
| 301 W. High Street, Room 880 |) | |
| Jefferson City, MO 65102, |) | |
| |) | |
| Defendant. |) | |

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Missouri Alliance for Freedom, Inc. (“MAF”) alleges for its Petition for Declaratory and Injunctive Relief:

Nature of the Case

1. This is a suit for access to public records. Auditor Galloway has purposely treated as closed and refused to produce public records without legal justification. MAF asks the court to enjoin her unlawful acts.

2. MAF has sent Galloway three public records requests, dated May 2, May 8, and May 26, 2017. Galloway received these requests on May 2, May 9, and May 26, 2017.

3. More than three days has passed since Galloway received MAF's requests—more than 75 days have passed since she received the first request. She has produced virtually none of the records requested. Instead, she has produced a series of almost identical, boilerplate refusals couched as “responses” promising to provide further updates—but no production—in 30 and 60 days' time.

4. She has also unlawfully treated records as closed without adequate justification.

5. MAF asks the court to enjoin Galloway to produce the requested public records, to assess a civil penalty for her purposeful and unlawful refusal to produce and purported closure of records, and to assess fees and costs.

Parties

6. MAF is a Missouri corporation organized under the Missouri Nonprofit Corporation Act and recognized as tax exempt under Section 501(c)(4) of the Internal Revenue Code. It accomplishes its exempt purpose in part by shedding light on government activities through public records requests.

7. Defendant Nicole Galloway is the acting Missouri State Auditor, a position she has held since April 27, 2015. Galloway is a Missouri resident and, on information and belief, resides in Boone County.

Jurisdiction and Venue

8. MAF brings this action pursuant to Sections 109.180, 610.027, 610.030 and Chapters 526 and 527, RSMo., the right of access to public records under the common law of Missouri, and Missouri Rules of Civil Procedure 87 and 92. Jurisdiction lies in this Court under Article V, Section 14 of the Missouri Constitution.

9. Venue is proper in this Court pursuant to Section 610.027.1, RSMo.

10. This action is timely pursuant to Section 610.027.5, RSMo.

Factual Allegations Common to All Counts

11. The Missouri State Auditor is a public governmental body.

12. MAF sent three different requests to inspect and copy documents to Galloway dated May 2, May 8, and May 26, 2017. All three made similar statements about the nature and processing of the request.

13. First, each stated that "This is a request for records under the Missouri Sunshine Law, Chapter 610, RSMo."

14. Second, each requested that Galloway produce documents on a rolling basis: "If at least some records can be produced without objection or are clearly responsive, please produce these documents first."

15. Third, MAF specifically asked Galloway to identify the basis for any refusal to produce responsive documents:

If you deny any part of this request, please cite each specific exemption you feel justifies the refusal to release information and notify me of the

appeal procedures available to me under the law. If there are any portions of this request that you find objectionable for any reason, please notify me in writing of the objections immediately, identifying by date and subject what documents are covered by the objection, and the legal authority for the objection. Please consider each request separately, so that any objection to one request will not unnecessarily delay responses to the remainder of the requests.

I. The May 2, 2017 Sunshine Request

16. On May 2, 2017, MAF sent Galloway a request to inspect and copy public records under Chapter 610, RSMo. A copy of this request is attached to this Petition as Exhibit A and is incorporated by reference as if fully set forth herein.

17. The request sought all records relating to Galloway's audit of the Missouri Department of Revenue, including a subpoena that Galloway had issued to the Department of Revenue, all records relating to Galloway's decision to audit the Department of Revenue, and all records of communications within the Auditor's Office or between the Auditor's Office and others relating to the audit of the Department.

18. In addition, MAF asked to inspect and copy all records of communications to or from two of Galloway's employees, Paul Harper and Douglas Nelson, from April 27, 2015 to the present.

19. Galloway received this request on May 2, 2017.

20. On May 5, 2017, Galloway provided the requested subpoena, one letter from Paul Harper to Wood Miller, Acting Director of the Department of Revenue, one letter from Paul Harper to Joel Walters, Acting Director of the Department of Revenue,

and one letter from Joel Walters, Acting Director of the Department of Revenue to Paul Harper in response.

21. In her May 5, 2017 letter, Galloway's counsel stated that all other records "relating to the audit of the Department of Revenue" are "confidential under Sections 29.070, 29.200.17, 32.057, 610.021(14), and 610.021(17), RSMo." Despite MAF's specific request and the prescription of § 610.023(4), RSMo., Galloway's counsel did not identify the date and subject matter of records that Galloway asserted were confidential and did not provide a log of such documents.

22. On information and belief, Galloway retains other records responsive to MAF's request, including records relating to her decision to audit the Department of Revenue and records of communications between her office and third parties concerning the audit. On information and belief, Galloway knew that she retained such records at the time of MAF's request and purposely determined to assert a blanket claim of confidentiality over them.

23. Galloway's assertion of confidentiality is overbroad. None of the statutes cited by Galloway's counsel protect "records relating to your decision to audit the timeliness of the Department's issuance of tax refunds." Galloway's counsel did not deny that such records existed; instead, she treated them as closed and refused to produce them: "As to your request for records relating to the audit of the Department of Revenue, I have attached a copy of the subpoena and a letter dated April 18, 2017. The re-

maintaining requested information is confidential under Sections 29.070, 29.200.17, 32.057, 610.021(14), and 610.021(17), RSMo.” Galloway’s assertion of confidentiality for these records and, on information and belief, many others, is unsupported in the law.

24. None of the statutes cited by Galloway’s counsel protect from disclosure records of communications between her office and third parties. Galloway’s counsel did not deny that such records existed; instead, she treated them as closed and refused to produce them: “As to your request for records relating to the audit of the Department of Revenue, I have attached a copy of the subpoena and a letter dated April 18, 2017. The remaining requested information is confidential under Sections 29.070, 29.200.17, 32.057, 610.021(14), and 610.021(17), RSMo.”¹ None of these statutes supports an assertion of confidentiality over communications between the Auditor’s office and third parties.

25. In her May 5, 2017 letter to MAF, Galloway’s counsel also stated that

Our office is in the process of reviewing the remainder of your request. Because of the scope of your request and that it covers approximately 2 years, we will provide you with an update of the status of your request no later than 30 days [sic] and will provide you with any responsive documents as we complete our review.

26. On June 2, 2017, Galloway, by counsel, sent MAF a second letter. It addressed MAF’s request for “records relating to the audit of the Missouri Department of

¹ For example, using her official and personal Twitter accounts, Galloway has published many tweets relating to her audit of the Department of Revenue’s processing of tax refunds, including tweets about her communications with the press concerning the audit. No statute permits closure of these records.

Revenue and records of communications to or from Paul Harper and Doug Nelson.” In a paragraph that has become familiar, Galloway’s counsel wrote:

Because of the scope of your request and that it covers approximately 2 years, our office is in the process of reviewing your request. We will provide you with an update on the status of your request in no later than 60 days.

27. On June 30, 2017, Galloway, by counsel, sent MAF a third letter, stating:

We are also processing your sunshine law request that our office received on May 2, 2017 regarding records of communication to or from Paul Harper and Doug Nelson. Because of the scope of each of your requests and that they cover approximately 2 years, we will provide you with an update of the status of your request in no later than 60 days and will provide you with any responsive documents as we complete our review.

28. More than 75 days have passed since Galloway received MAF’s request.

29. In those 75 days, Galloway has provided only three records of communication to or from Paul Harper and no records of communication to or from Douglas Nelson.

30. On information and belief, Galloway retains more than three records of communication to or from Paul Harper and at least one record of communication to or from Douglas Nelson.

31. Despite having more than 75 days to review and provide the requested records, Galloway has informed MAF that it intends to further “provide . . . an update of the status of your request” within an additional 60 days. It has provided no indication of when it will produce the relevant documents.

32. "Each request for access to a public record shall be acted upon as soon as possible, but in no event later than the end of the third business day following the date the request is received by the custodian of records of a public governmental body." § 610.023, RSMo.

33. The period for document production may exceed three business days only for "reasonable cause." § 610.023, RSMo.

34. Galloway has identified no reasonable cause to delay production of the requested records for more than 40 times the statutory time limit.

35. Galloway has no reasonable cause to delay production of the requested records for more than 40 times the statutory time limit.

36. The overbroad assertions of confidentiality and pattern of repeated delay and refusal to produce documents indicate that Galloway is purposely denying MAF's request. Galloway has not identified a basis in law to deny MAF's request and has no such basis.

II. The May 8, 2017 Request

37. On May 8, 2017, MAF sent Galloway a request to inspect and copy public records under Chapter 610, RSMo. A copy of this request is attached to this Petition as Exhibit B and is incorporated by reference as if fully set forth herein.

38. The request sought records relating to Galloway's audit of the Missouri Office of State Treasurer for the year ending June 30, 2016 and relating to Galloway's

closeout audit of the Treasurer from July 1, 2016 to January 9, 2017. It specifically sought, among other records, all records of communications between Galloway, her employees and agents (including Harper and Nelson) and any other individual, organization, or entity relating to the Treasurer's management of Unclaimed Property.

39. Galloway received this request on May 9, 2017.

40. Galloway's attorney then wrote MAF, providing a copy of an audit report with number 2017-028, dated April 2017. Galloway's counsel treated all other responsive records as closed, refusing to produce them and stating that: "The remaining requested information is confidential under Sections 29.070, 29.200.17, 32.057, 610.021(14), and 610.021(17), RSMo." Despite MAF's specific request and the prescription of § 610.023(4), RSMo., Galloway's counsel did not identify the date and subject matter of records that Galloway asserted were confidential and did not provide a log of such documents.

41. Galloway's counsel's assertion of confidentiality is overbroad. MAF requested all records of communications between Galloway or her agents and employees and any other individual, organization, or agency relating to the Treasurer's management of Unclaimed Property. This request included communications with third parties; in fact, MAF specifically requested communications between Galloway or her agents and employees and the press.

42. Galloway's counsel did not deny the existence of records of such communications. Instead, she asserted a blanket claim of confidentiality over "[t]he remaining requested information" —in other words, all information that MAF requested other than the audit report itself. She did not deny that Galloway retained such documents; she treated them as closed. Galloway's counsel cited no statute that permits a public governmental body—even the Auditor—to protect her communications or the communications of her agents with third-parties, especially the press. No such statute exists.

III. The May 26, 2017 Request

43. On May 26, 2017, MAF sent Galloway a request to inspect and copy public records under Chapter 610, RSMo. A copy of this request is attached to this Petition as Exhibit C and is incorporated by reference as if fully set forth herein.

44. The request sought "all records of communication you have sent or received while serving as Auditor."

45. Galloway received this request on May 26, 2017.

46. On June 1, 2017, Galloway's attorney wrote MAF. She stated as follows: "Audit reports and other records of communication sent by the State Auditor are available at <https://auditor.mo.gov>."

47. Galloway's counsel did not state that every record responsive to MAF's request was available at the link provided. Instead, she wrote:

Our office is in the process of reviewing the remainder of your request. Because of the scope of your request and that it covers approximately 2 years, we will provide an update of the status of your request in no later than 30 days and will provide you with any responsive documents as we complete our review.

48. On June 30, 2017, Galloway's counsel wrote a second time concerning the status of the May 26 request.

Our office is in the process of reviewing the remainder of your request. We are also processing your sunshine law request that our office received on May 2, 2017 regarding records of communication to or from Paul Harper and Doug Nelson. Because of the scope of each of your requests and that they cover approximately 2 years, we will provide you with an update of the status of your request in no longer than 60 days and will provide you with any responsive documents as we complete our review.

49. Fifty-one days have passed since Galloway received MAF's request.

50. In those 51 days, Galloway has produced no communications other than audit reports and press releases available on her website.

51. On information and belief, Galloway retains communications that she has sent or received other than those available on her website.

52. Despite having had more than 12 times the statutory time limit of three days to process MAF's request, on June 30 Galloway stated (by counsel) that she needs an additional 60 days before she can "provide . . . an update of the status of the your request."

53. Galloway has identified no reasonable cause to delay production of the requested records for a total of more than 32 times the statutory time limit.

54. Galloway has no reasonable cause to delay production of the requested records for a total of more than 32 times the statutory time limit.

55. The pattern of repeated delay and refusal to produce documents on a rolling basis indicates that Galloway is purposely denying MAF's request. Galloway has not identified a basis in law to deny MAF's request and has no such basis.

COUNT I –GALLOWAY HAS UNLAWFULLY REFUSED TO PRODUCE PUBLIC RECORDS IN RESPONSE TO THE MAY 2, 2017 REQUEST

56. MAF incorporates the preceding paragraphs of this Petition as if fully set forth herein.

57. On May 2, 2017, MAF sent a request to Galloway to review records of communications to and from Paul Harper and Douglas Nelson, two of her employees.

58. Galloway received this request on May 2, 2017.

59. In the more than 75 days since she received the request, Galloway has produced only one letter to and two letters from Paul Harper. She has produced no records of communications to or from Douglas Nelson.

60. On information and belief, she retains more than three records of communication to and from Paul Harper and at least one record of communication to and from Douglas Nelson.

61. Galloway has delayed her production of these records three times (May 5, 30-day delay; June 2, 60-day delay; June 30, 60-day delay) without asserting a reasonable cause for her delays.

62. Galloway has no reasonable cause for delay or for refusing to produce public records responsive to MAF's request.

63. Galloway has purposely refused permission and denied MAF's request to inspect public records in violation of Sections 109.180, 610.023, RSMo., and the right of access to public records under the common law of Missouri.

WHEREFORE, MAF prays that this Court:

(I) declare that Galloway has purposely violated Sections 109.180, 610.023, RSMo., and the right of access to public records under the common law of Missouri;

(II) enjoin Galloway to produce the requested public records;

(III) assess a civil penalty of \$5,000 on Galloway for her purposeful violations;

(IV) order Galloway to pay MAF's costs and attorneys' fees; and

(V) grant such further relief as is just and proper.

COUNT II – GALLOWAY HAS UNLAWFULLY REFUSED TO PRODUCE PUBLIC RECORDS IN RESPONSE TO THE MAY 2, 2017 REQUEST

64. MAF incorporates the preceding paragraphs of this Petition as if fully set forth herein.

65. As part of its May 2, 2017 request, MAF sought to inspect and copy two specific subclasses of records: records of Galloway's decision to audit the Department of Revenue and records of communications between Galloway's office and third parties.

66. In her May 5, 2017 letter to MAF, Galloway's counsel did not deny that such records existed. Instead, she asserted that all records that MAF requested other than those produced were confidential: "The remaining requested information is confidential under Sections 29.070, 29.200.17, 32.057, 610.021(14), and 610.021(17), RSMo."

67. On information and belief, Galloway retains records responsive to this request. For example, Galloway's official and personal Twitter feeds reveal many tweets concerning this audit as well as various communications Galloway has had with the press concerning this audit.

68. None of the statutory sections cited supports Galloway's assertion of confidentiality for records of her decision to audit the Department of Revenue and records of communication between her office and third parties.

69. Galloway purposely treated these records as closed and refused to produce them without any basis in the law. Galloway has never produced any records responsive to these requests other than the subpoena and three letters between Paul Harper and the Department of Revenue, the audited agency.

70. More than three days have passed since MAF's request.

WHEREFORE, MAF prays that this Court:

- (I) declare that Galloway has purposely violated Sections 109.180, 610.023, RSMo., and the right of access to public records under the common law of Missouri;
- (II) enjoin Galloway to produce the requested public records;
- (III) assess a civil penalty of \$5,000 on Galloway for her purposeful violations;
- (IV) order Galloway to pay MAF's costs and attorneys' fees; and
- (V) grant such further relief as is just and proper.

COUNT III –GALLOWAY HAS UNLAWFULLY REFUSED TO PRODUCE PUBLIC RECORDS IN RESPONSE TO THE MAY 8, 2017 REQUEST

71. MAF incorporates the preceding paragraphs of this Petition as if fully set forth herein.

72. On May 8, 2017, MAF sent Galloway a request for records relating to her audits of the Treasurer.

73. MAF specifically requested all records of communication between the Office of the Auditor and any third party individual, organization, or agency. MAF specifically requested communications between Galloway's office and any news or press organization.

74. Galloway received this request on May 9, 2017.

75. In a May 12, 2017 letter, Galloway's counsel provided a copy of the Auditor's audit report of the Treasurer. She did not deny that Galloway retained the other records requested. Instead, she asserted that all records that MAF requested other than

those produced were confidential: "The remaining requested information is confidential under Sections 29.070, 29.200.17, 32.057, 610.021(14), and 610.021(17), RSMo."

76. On information and belief, Galloway retains records responsive to this request.

77. None of the statutory sections cited supports Galloway's assertion of confidentiality for records of communication between her office and third parties.

78. Galloway purposely treated these records as closed and refused to produce them without any basis in the law. Galloway has never produced any records responsive to these requests other than a copy of the audit report.

79. More than three days have passed since MAF's request.

WHEREFORE, MAF prays that this Court:

(I) declare that Galloway has purposely violated Sections 109.180, 610.023, RSMo., and the right of access to public records under the common law of Missouri;

(II) enjoin Galloway to produce the requested public records;

(III) assess a civil penalty of \$5,000 on Galloway for her purposeful violations;

(IV) order Galloway to pay MAF's costs and attorneys' fees; and

(V) grant such further relief as is just and proper.

COUNT IV –GALLOWAY HAS UNLAWFULLY REFUSED TO PRODUCE PUBLIC RECORDS IN RESPONSE TO THE MAY 26, 2017 REQUEST

80. On May 26, 2017, MAF sent a request to Galloway to inspect and copy all records of communications she has sent or received while serving as Auditor.

81. Galloway received this request on May 26, 2017.

82. Galloway has refused to produce any such records other than reports of audits and press releases that appear on the Auditor's website.

83. She has twice delayed her response, first on June 1 (for 30 days) and again on June 30 (for 60 days). She has not promised to produce any documents in the 60-day delay period.

84. On information and belief, she retains records responsive to MAF's request.

85. Her repeated refusal to provide any responsive documents and her repeated delays indicate that Galloway has purposely refused to provide the records requested.

86. More than three days has passed since she received the request.

WHEREFORE, MAF prays that this Court:

(I) declare that Galloway has purposely violated Sections 109.180, 610.023, RSMo., and the right of access to public records under the common law of Missouri;

(II) enjoin Galloway to produce the requested public records;

(III) assess a civil penalty of \$5,000 on Galloway for her purposeful violations;

(IV) order Galloway to pay MAF's costs and attorneys' fees; and

(V) grant such further relief as is just and proper.

Respectfully submitted this 17th day of July, 2017.

GRAVES GARRETT, LLC



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