IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

MISSOURI ALLIANCE FOR FREEDOM, INC.,	)	
Plaintiff,	)	
	)	Case No. 17AC-CC00365
v.	)	
STATE AUDITOR NICOLE GALLOWAY,	)	
Defendant.	)	

FNDINGS OF FACT,
CONCLUSIONS OF LAW and JUDGMENT

Plaintiff Missouri Alliance for Freedom, Inc. (MAF) filed suit against the State Auditor's Office (SAO) alleging non-compliance with Chapter 610 RSMo (the Sunshine Law) based upon three public records requests that were sent in May, 2017. MAF filed its First Amended Petition (FAP) in March, 2018, alleging that text messages were not included in a public records request that sought all records of communications of State Auditor Galloway for her entire term of office. MAF alleges that the failure to provide text messages constituted a knowing and purposeful violation of the Sunshine Law.

A bench trial was held on August 27 and August 28, 2018. Evidence was adduced and the parties rested. The parties were granted 30 days to submit proposed findings of fact and conclusions of law. The Court having considered the evidence adduced and the arguments of counsel, is duly advised in the premises and enters its judgment.

FINDINGS OF FACT

1. The Missouri Alliance for Freedom, Inc. (MAF) is a Missouri corporation organized under the Missouri Nonprofit Corporation Act and is tax exempt under Section 501(c)(4) of the Internal Revenue Code. FAP, ¶16.

2. Missouri Auditor Nicole Galloway is a public governmental body within the meaning of Chapter 610 of the Revised Statutes of Missouri.

I. The Public Records Requests

3. MAF sent a series of broad requests on May 2, May 8, and May 26, 2017, respectively. JS[1] ¶¶19, 21; Defendant's Exhibits 1, 5, 7. While the present litigation is addressed to a portion of the records requested in the May 26 request, the SAO processed all requests simultaneously. Tr. 86:11-22.

4. MAF's May 2, 2017 records request asked for:

a. All records relating to the audit of the Missouri Department of Revenue's timeliness in issuing income tax refunds;

b. The subpoena issued by the State Auditor to the Missouri Department of Revenue on April 19, 2017;

c. All records relating to the decision to audit the timeliness of the Department's issuance of tax refunds;

d. All records of communication within the Office of the State Auditor (SAO) relating to the audit of the timeliness of income tax refunds;

[1]"JS" refers to "Joint Stipulations" filed with the Court.

e. All records of communication between the SAO and any other party relating to the audit of the timeliness of income tax refunds;

f. All records of communication to or from the SAO's general counsel, Paul Harper from April 27, 2015 to May 2, 2017;

g. All records of communication to or from Douglas Nelson from April 27, 2017 to May 2, 2017.

5. The May 2, 2017 request asked that its request terms be interpreted as broadly as possible, and to produce electronic data in its native format, preserving all metadata.

6. The May 8, 2017 request sought all records relating to the audit of the Missouri Office of the State Treasurer relating to the closeout audit of the Treasurer for the period from July 1, 2016 to January 9, 2017.

7. The May 26, 2017 request sought all records of communication to and from the State Auditor for her entire term of office without limitation, except that MAF wanted all electronic data to be produced in "native format, preserving all metadata." MAF listed the types of records to include documents; notes; correspondence; memoranda; letters; email; faxes; spreadsheets; databases; telephone call logs; recordings or notes of telephone conversations; recordings or notes of voicemails; recordings, notes, minutes, or agenda of meetings, text messages, instant messages, and calendar entrie**s.** Defendant's Exhibit 7.

8. Both the May 2 and May 26, 2017, requests demanded "native format" files "preserving all metadata" for all electronic data responsive to the requests. Defendant's Exhibits 1, 7. In discovery, MAF asked the SAO to identify "all text and instant messages that

you contend you produced to MAF in their native format in response to its May 26 request." Plaintiff's Exhibit T, Interrogatory No. 64.

II. Record Retention at the State Auditor's Office

9. Text messages are used to communicate regarding public business at the SAO. Joint Stipulations, ¶10.

10. Text messages sent and received by Auditor Galloway may include communications about daily, weekly, or monthly work assignments, and calendar maintenance of the Auditor. Joint Stipulations, ¶12, 13.

11. Records in the Auditor's office are maintained in hard-copy form, on computer drives, and in e-mail. Tr. 79:25–80:8. It is in these areas that searches are performed for records that are potentially responsive to a Sunshine Law request. The memorialization of any records retained would be in one of those mediums, as chosen by the person making the record. Renick Dep. Desig. 35:25-36:13; Plaintiff's Exhibit S, Interrogatory No. 60.

12. The SAO does not use cell phones to retain information. Plaintiff's Exhibit S, Interrogatory No. 50. If information in a text message needs to be retained, the text message is transcribed or summarized in a word processing document, a printed page, or in an e-mail. Plaintiff's Exhibit S, Interrogatory No. 60. The only method the SAO has to preserve text messages in a form recognizable as a text message is through screenshots. Renick Dep. Desig. 38:10-17. Text messages memorialized in another form, such as an e-mail, word processing file, or hard-copy document, would be retained in such form and may not be identified as originating in a text message. Plaintiff's Exhibit X, Request for Documents No. 36; Plaintiff's Exhibit S, Interrogatory No. 60.

13. On November 17, 2017, subsequent to the SAO's response to MAF's May 26, 2017 records request, Information Technology staff (IT) was asked to change the "keep messages" setting on the Auditor's phone from its 30-day setting to "forever," and later screenshots of those the text messages were made when work was done to the phone in order to avoid losing text message data. Reuter Dep. Desig. 44:12-45:7; Wood Dep. Desig. 221:7-15. Screenshots of the Auditor's text messages were made on December 18, 2017, January 10, 2018, March 22, 2018, and March 28, 2018. Plaintiff's Exhibit S, Interrogatory No. 55.

III. Processing of Public Records Requests

14. The SAO has a written policy for the processing of public records requests (Meetings and Open Records Request (Sunshine Law) Policy, Revised December 30, 2015). Substantively, this policy tracks the requirements and exemptions appearing in Chapter 610 RSMo. Plaintiff's Exhibit I.

15. In the Auditor's Office, Senior Counsel Barbara Wood performs the functions of the records custodian with respect to fulfilling Sunshine Law requests. Tr. 71:23-72:4; 73:21-25. Sunshine Law response duties at the SAO are delegated to a senior attorney like Wood due to the highly confidential information possessed by the Auditor's Office and the need to carefully review each record before it is released. Tr. 73:21-75:3.

16. Wood began working at the SAO at the end of January, 2017 and had been working at the SAO approximately three months before MAF's first Sunshine Law request was served. Tr. 68:18-24. Prior to her position with the SAO, Ms. Wood served at the Missouri Attorney General's Office, the Department of Health and Senior Services, and the Missouri Secretary of State's Office. Tr. 69:3-11. Wood had experience overseeing responses to Sunshine

Law requests at the Department of Health and Senior Services where she served as general counsel, and at the Secretary of State's Office where she served as the general counsel and deputy Secretary of State. Tr. p. 69:5-16.

17. Upon receipt of a Sunshine Law request, Wood notifies several office staff of receipt of the request, including the general counsel, the chief of staff, and the administrative assistant to the chief of staff, after which Wood commenced locating and collecting potentially responsive records. Tr. 75:4-76:5; 81:4-19; 83:22-84:2.

18. For Sunshine Law requests that seek specific records, the records custodian (Wood) will attempt to obtain such records directly from the employees believed to have such records. For broader requests, Wood will work with the IT staff to complete a search of all office network computer drives, and to perform an e-mail search. Tr. 76:16-77:8; 77:9-78:25. The records collected in such searches are provided to Wood for review. Wood is sometimes assisted by an administrative assistant working at Wood's direction. Tr. 79:1-14.

19. In processing a Sunshine Law request, Ms. Wood may consult with the general counsel on questions regarding the location of records. Tr. 75; 76:6-15; 108:10-17. All records gathered for review are gathered by or at the direction of Ms. Wood. Tr. 92:7-93:7.

IV. The Processing of MAF's Public Records Requests

20. Upon receipt of MAF's May 2, 2017 request (Defendant's Exhibit 1), Wood notified several staff members, including the general counsel, the chief of staff, and the administrative assistant to the chief of staff. Tr. 81:4-19.

21. For the May 2, 2017 request, Wood immediately began searching the office systems, looking for hard copy records, e-mails, and computer drive records. Tr. 82:3-13. The

first of several records delivery accompanied the three-day letter, and additional records were delivered in August, 2017, and continued on a monthly basis until November, 2017 when the process was halted based upon a fourth Sunshine Law request from MAF that asked that this fourth request be processed ahead of any prior MAF requests. Tr. 84:16-24. The process continued after the November, 2017 request was completed and continued until February, 2018. Tr. 104:3-16.

22. Wood received MAF's May 8, 2017 Sunshine Law request on May 9, 2017, and followed the same procedure for processing it as she following for the May 2, 2017 request: She notified several senior staff members (including the general counsel) and commenced a records search. Defendant's Exhibit 6; Tr. 83:15-84:6. The May 8 request was much smaller in scope than the May 2 or May 26, 2017 requests. Tr. 85:3-14.

23. MAF's May 26, 2017 records request was received on May 26, 2017. It was similar to the May 2, 2017 request in that it requested all communications from the Auditor in similar fashion to the request for all communications of the general counsel and senior advisor. Tr. 86:1-8. Defendant's Exhibit 7. The May 2, and May 26, 2017 requests were much larger in scope and required months to complete. Both were being processed simultaneously. Tr. 86:11-22. Document review for one request would occur while documents were being collected for another request. Tr. 101:15-102:4

24. Processing of the May 26, 2017 records request was handled in the same manner as the prior requests, with searches done for hard-copy documents, e-mail, and computer drive records. It was a more challenging search because the Auditor's name is on all letterhead whether or not the record was a communication with the Auditor. Tr. 86:23-87:8; 89:11-18.

Wood immediately executed a computer drive search for records, sought out staff who might have responsive records, and worked with IT to perform an e-mail search. Tr. 90:8-91:19; Plaintiff's Exhibit L, M.

25. At no time during the document collection process of the May 26, 2017 request did the general counsel provide Wood with any orders or instructions not to look at or to limit the sources of records she would locate for review. Tr. 91:20-92:5.

26. All records collected for review by Wood were found by Wood or provided to Wood as a direct result of her search instructions, and Wood was never instructed not to review any records or portions of records that she found, and was not provided with records that she had not herself requested. Tr. 92:7-93:7.

27. Wood's review of records collected for MAF requests included tens of thousands of documents. Tr. 107:13-19. As records were assembled, Wood collected them into categories of those she believed were responsive, those believed to be confidential/personnel, those believed to be confidential/attorney-client privilege, those believed to be confidential/audit or audit-related supportive materials, etc. Once that was done, Wood would do a legal review with the general counsel and explain why she sorted the records in the manner that she did. Any records needing redaction would be also be addressed. Tr. 99:11-100:24.

28. Wood's initial search for records responsive to MAF's May 26, 2017, request was directed globally to "communications" of the State Auditor, and was not addressed to any of the 16 examples set forth by MAF as to what constituted a communication, including text messages, as distinct communications. Text messages, specifically, are not preserved on phones; they are

memorialized in another form at the time the record is made. Renick Dep. Desig. 35:25-36:13. Plaintiff's Exhibit X, Request for Documents No. 36; Plaintiff's Exhibit S, Interrogatory No. 60.

29. After service of the lawsuit but while continuing the process of gathering and reviewing potentially responsive records to their Sunshine request, Wood first learned that text messages are discarded from office phones automatically after 30 days. During a conversation about the original petition, Harper asked her whether the Auditor's cell phone had been switched from its 30-day keep-messages setting. Wood Dep. Desig. 130:21-131:20; Tr. 95:5-23. Wood was informed that Harper and Doug Nelson had changed the setting on their phones upon receipt of MAF's May 2, 2017, request in order to preserve their text messages. Wood Dep. Desig. 134:11-19; 139:6-17; 140:23-141:16. Plaintiff's Exhibit U, Interrogatory No. 69.

30. Upon learning that the office cell phones were set to discard text messages after 30 days, Wood consulted with the office IT section about the 30-day discard setting and to inquire about recovering text messages that had been discarded from the office phones. Wood was told that such messages could not be recovered. Harper reported to Wood that he had confirmed with the Auditor that the Auditor's phone was set to 30 days and that there were no text messages available for the period requested by MAF. Tr. 96:5-19; 97:22-98:1-15; Wood Dep. Desig. 132:7-19; 134:11-19. The Auditor's phone was also confirmed to have a 30-day "keep messages" setting when it was changed to "forever" by former IT technician Rene Reuter on November 17, 2017. Reuter Dep. Desig. 44:12-45:7. Wood was satisfied that from her conversation with IT about the retrieval of discarded text messages, she would have been informed if there were any phone backup files from which text message data could be recovered. Wood Dep. Desig. 158:7-24.

31. According to SAO IT manager Cindy Renick, iPhones have a default "keep messages" setting of 30 days, though the SAO does not keep track of whether an individual employee changed this setting. Renick Dep. Desig.75:6-16; 76:25-77:3; 84:10-20. Renick's knowledge of the default "keep messages" of 30 days is based on her personal knowledge that every phone she has seen had the 30-day setting. Renick Dep. Desig. 86:1-6. The State Auditor's phone would have been issued to her with the default "keep messages" setting of 30 days, and there was no evidence that this setting was changed other than a change from 30 days to "forever" on November 17, 2017. Renick Dep. Desig. 84:21-85:5; 81:15-82:5.

32. Screenshots of text messages from Paul Harper's phone were created and then transferred to the computer on or about July 27, 2017 and screenshots of text messages from Douglas Nelson's phone were created and transferred on or about July 26 and July 28, 2017. Ms. Wood reviewed Doug Nelson's screenshots of texts between September and October, 2017 and reviewed Paul Harper's screenshots of texts between January and early February, 2018. Plaintiff's Exhibit S, Interrogatory No. 57.

33. Believing that all other phones were set for 30 days based on her conversations with the general counsel and with IT, Wood did not inquire further into text message retrieval. Wood Dep. Desig. 140:12-25; 142:4-11. Harper never instructed Wood not to search phones. Wood Dep. Desig. 148:17-25.

34. No litigation hold was issued after the filing of the MAF case because all documents related to this request were already preserved. Wood Dep. Desig. 183:15-18.

35. Approximately 47,000 pages of records were produced to MAF for MAF's Sunshine Law requests, of which 4,652 pages of records were produced to MAF for the May 26, 2017. Tr. 107:13-19.

36. On July 19, 2018, Defendant produced to MAF 254 screenshot pages of text messages with the Auditor dated approximately August 25, 2015 to approximately January 5, 2017 from the backup file of Gena Terlizzi's phone, and one screenshot page from the phone of Sherrie Brown, dated February 10, 2016. Plaintiff's Exhibit X, Request for Documents No. 27. These text messages were found in a backup of these phones on a decommissioned computer used by IT technician Jay Cramer. Cramer did not believe any backups existed, believing that any backup that was made would overwrite any previous backup stored on his computer--a process that he believed would occur any time a phone was plugged into his computer. In discussing this with his manager, Renick, she suggested looking to see if Cramer's decommissioned computer was still in the office and to see if anything was stored on it. Cramer Dep. Desig. 80:15-81:12; 82:12-84:6; Renick Dep. Desig. 61:22-62:18.

V. Cellular Phone Data

37. The SAO does not perform backups of cell phones to preserve data. The Outlook application on the phones (that handles e-mail and calendars) is tied to the office servers, so there is no need for a backup. Text message data is not backed up. Renick Dep. Desig. 30:20-31:12. A phone backup may be performed to facilitate the transfer of data between phones when an employee receives a new phone, but are not done to back up data. Cramer Dep. Desig. 28:23-29:17.

38. To make a screenshot of text messages from a backup file, the backup file must be transferred to a blank iPhone, and then screenshots are individually created. Cramer Dep. Desig. 111:17-112:3.

39. Cell phones are handled the same way as computers when an employee leaves and the phone needs to be reset for the next employee: The employee, and at times in consultation with their supervisor, determines whether there is any data (not already on office servers) that needs to be given to someone else as a record or a work paper prior to the device being given to IT. Renick Dep. Desig. 32:2-20. From the IT perspective, there is nothing that needs to be removed from a phone since the phone is tied to the office servers. Renick Dep. Desig. 35:10-36:3.

40. Cell phones in the SAO are not remotely accessible by IT: The password for the phone is with the employee, and the employee would have to provide it to the IT personnel. Renick Dep. Desig. 38:10-39:8.

41. Nathan Little testified as an expert in computer engineering and digital forensics, including mobile digital forensics, work with Apple iPhones, Android phones, and tablets. Tr. 119:1-121:6.

42. Little performed digital forensic data recovery on 13 devices (phones, iPads, backup files) from the SAO. Tr. 125:9-129:24. Little was attempting to recover text message data that would constitute communications to or from the phone assigned to the State Auditor from April 1, 2015 to May 26, 2017 on these devices. Tr. 129:25-130:4. Little was unable to recover any discarded text records from any of the devices. Tr. 130:5-16.

43. Apple devices present challenges to data recovery because the devices are encrypted to prevent unauthorized access. Tr. 130:20-131:12. With a computer, a hard or solid state drive can be removed, a forensic image can be made, and full access can be gained to all of the data regardless of whether a user's password is known. With a cell phone, there is full disk encryption and all data is scrambled unless the password is used. Tr. 132:8-24. On Apple's modern operating systems, such as the ones used on the phones at the State Auditor's Office, the phone actually "cleans up" the text databases making recovery of deleted data impossible. Tr. 132:25-133:10; 133:22-135:3.

44. Little was able to determine that the State Auditor's keep messages setting on her phone had been changed to "forever," and the appearance of this in the phone's settings history indicates that the phone had been set either to 365 days or 30 days at some point earlier in time. Tr. 136:16-137:13. Because of numerous operating system changes and the fact that Apple does not publish its default settings, Mr. Little could not say definitively what the default "keep messages" settings would have been for a particular iPhone on any of the operating systems that were in use at the SAO. Tr. 169:10-170:24.

45. When opening a Microsoft Word file and looking at it on a computer screen, a user is actually looking at a "file." On an iPhone, when a user is looking at a text message, what is displayed on the phone's screen is a portion of a database (tables) and the display will show data that has been joined from different tables. Tr. 138:1-13. When looking at a text message, a user is seeing a merge of multiple files, as well as a subset of one larger file. Tr. 139:3-10. When a user clicks to view a conversation on the phone, the phone is actually running a query in the

background, performing operations such as joining a message table with an attachments table and pulling a file from another spot on the phone. Tr. 139:11-140:2.

46. In reviewing MAF's May 26, 2017 request letter language with respect to the production of electronic data, it is not possible to produce text messages in their native format, preserving all metadata. According to Little, there isn't a native format for a text message that can be provided. Tr. 146:24-147:9.

47. With respect to accessing and looking at data on an Apple iPhone, one of the primary differences compared to a computer is that you cannot look at the underlying data of the database. An iPhone only exposes the data it is programmed to believe a user should be able to see. Tr. 140:9-22. An iPhone does not permit a user to simply print the underlying database or send/transmit the underlying database. Tr. 140:23-141:2.

48. The tools necessary for digital forensics and the ones used by Little in examining SAO cell phones and iPads are not marketed to IT departments. Tr. 141:3-24. Little conferred with SAO IT manager Cindy Renick and concluded that the SAO did not have the tools to attempt cell phone data recovery or to interact with cell phone databases. Tr. 143:6-144:3. In Little's opinion, the majority of IT departments do not have these capabilities, and the task is made more difficult by the fact that Apple is constantly updating their phones to prevent people from being able to pull specific files from their systems. Tr. 144:4-19.

CONCLUSIONS OF LAW

Plaintiff Missouri Alliance for Freedom (MAF) seeks a declaration that the Defendant State Auditor's Office (SAO) violated the provisions of Chapter 610 RSMo (the "Sunshine Law"),

that the violation was knowing and purposeful, and seeks imposition of the penalty provisions of §610.027 applicable to knowing and purposeful violations. MAF also seeks penalties under those sections for allegedly failing to preserve evidence as set forth in §610.027.1.

The Sunshine Law was enacted to provide the public with access to government records (and meetings). Stewart v. Williams Communications, Inc., 85 S.W.3d 29, 32 (Mo. App. W.D. 2002). The provisions of the Sunshine Law are to be liberally construed in favor of openness. §610.011.1. A claim for a basic violation of the Sunshine law is made by a showing that there was a request for access to a public record and that the entity either did not act upon to the request within three business days, or closed the record. §610.023.3; Anderson v. Village of Jacksonville, 103 S.W.3d 190, 195-195 (Mo. App. W.D. 2003); Perkins v. Caldwell, 363 S.W.3d 149, 153 (Mo. App. E.D. 2012). Once this showing is made by the requestor, the burden of persuasion shifts to the agency to demonstrate compliance with the requirements of sections 610.010 to 610.026. The requestor has the burden of proving by a preponderance of the evidence any claims for statutory penalties for knowing and purposeful violations of those provisions. See generally, Laut v. City of Arnold, 491 S.W.3d 191 (Mo. banc 2016).

I.

It is undisputed that a request for access to all of the "communications" of the State Auditor for her entire term of office was made on May 26, 2017 and received by the SAO records custodian on that same date. Without qualification or any alternatives, MAF asked that electronic data be produced "in its native format, preserving all metadata."

A request for access to a public record must be communicated in such a way to allow a reasonably competent records custodian to identify records with reasonable specificity. Anderson v. Village of Jacksonville, 103 S.W.3d 190, 196 (Mo. App. W.D. 2003).

A reasonably competent records custodian carefully reading MAF's request would conclude that the requestor wanted all communications data that was in electronic form to be produced in the native format of that data and in a manner that preserves all metadata. Nathan Little, a cellular phone forensics expert, explained that such a task cannot be accomplished with text message data on the Apple iPhone operating systems. This is due, in part, to the fact that there is no text message "file" to produce, and also because the Apple iPhone operating systems actively attempt to prevent users from gaining direct access to such data. A "text message," Mr. Little explained, is more akin to a report that is assembled from information in multiple databases.

Consideration of how the Defendant “preserved” a text message when **it** wanted to do so is also instructive. Given the information and technology available to the Defendant, when a text message was to be saved, it was either by making a screenshot or forwarding it to an email or to a printer for a hard copy.

An agency is not required to create a record that does not already exist in order to satisfy a Sunshine Law request. American Family Mut. Ins. Co. v. Missouri Dept. of Ins., 169 S.W.3d 905, 914-915 (Mo. App. W.D. 2005); Jones v. Jackson County Circuit Court, 162 S.w.3d 53, 60 (Mo. App. W.D. 2005). In Jones, the plaintiff requested records on landlord petitions for rent and possession, unlawful detainer, and damages for breach of lease agreements. The plaintiff wanted records containing specific information about these types of cases. The request was

denied by the court administrator on the ground that the court only made records available by a single case or through a public index. Id. at 56.

Here, MAF's request for a "native file" would essentially amount to a production of one or more cell phone databases, or the creation of a single report that pulled together the requested information from those databases (complete metadata). This is no different than the records requested in Jones where the plaintiff essentially wanted information assembled and presented in a certain way, except for one complicating factor: The end-user of an iPhone does not have direct access to the database to create a report (a text message with metadata). The Apple operating systems on devices used by the SAO are designed to prevent such access.

While the Sunshine Law itself is to be liberally construed to promote openness, a government agency is not be required to interpret a records request beyond the language in the request that is reasonably specific. It is apparent from the testimony that the SAO would have provided screenshots of the requested records had those records been available to the custodian at the time of her searches, especially in light of the fact that hundreds of pages of text message screenshots were produced when a non-retained backup file from one employee's decommissioned computer was found. However, the terms of the request only asked for electronic data (text message data) in its native format, preserving all metadata: Had the agency had electronic files in native format available and the SAO produced only screenshots, MAF may have had a cause of action under Chapter 610. Accordingly, the failure to produce what was not specifically asked for or, put another way, the failure to choose what might have been the next-best thing (screenshots), should not be used to impose liability--even declaratory relief--especially where, as here, the evidence showed an enormous good-faith effort to comply

with several very large public records requests from MAF sent in the same month, which resulted in the production of over 47,000 pages.

Because the form of the records requested did not exist, the SAO did not violate the Sunshine Law by failing to produce them.

II.

While it has been established that the data requested could not exist in the form requested by MAF, even if it had, the SAO did not violate the Sunshine Law because of the lack of specificity in the MAF request.

Barbara Wood, a senior attorney with the SAO, performs the records custodian function for the office. Upon receipt of MAF's May 26, 2017 request for all communications to and from the Auditor, Wood commenced searches of the office's records storage systems within three business days. Records of communications at the SAO are retained in hard-copy files, computer files, and e-mail. Communications made by text message are not retained on phones but are instead memorialized in a form that can be stored as either hard copy, e-mail, or computer files. Text message data on phones is set to be discarded automatically after 30 days by default, a fact unknown to Wood as she conducted her searches. By the time she learned of this default setting, more than 30 days had elapsed. Wood checked with the technology section of the agency and confirmed the 30-day schedule and that discarded text message data could not be recovered.

A records request properly presented to a public governmental body must 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."

§610.023.3. There is no dispute that the agency responded to MAF's request by the third business day following receipt, or that Wood commenced her searches for responsive records immediately after receiving the request. Notifications to the proper personnel, the initiation of computer drive and e-mail searches were commenced within three days. It is also well-established in law and in the record that a great many of the records of the SAO are confidential and require a careful legal review prior to release. See, e.g., §§29.200.17, 29.070, 29.080. And the search and production concluded with a production of approximately 47,000 pages, plus attachments, of which 4,652 pages, plus attachments, were for the May 26, 2017 request.

MAF's records request was not for text messages or any other particular form of communication. The request was "all records of communication" with an instruction to interpret the request as broadly as possible, and 16 nonexclusive examples of what a "communication" might be.

The SAO clearly acted on this request in a timely manner. Text message content, if any, would have been included in the systems searched by Wood because it is in those systems that such records are maintained. The only potential records not secured for search were the cell phones themselves, and this was only because Wood was unaware of the 30-day "keep messages" settings on the phone and did not get to them within that timeframe.

A request for records requires that the requestor be reasonably specific so that a custodian of record can provide access to the record. Anderson v. Village of Jacksonville, 103 S.W.3d 190, 194-195 (Mo. App. W.D. 2003). While the breadth of a request does not invalidate the request, a lack of specificity may. This specificity requirement has not received much discussion in Missouri law, but similar issues have been discussed by a Washington court. See

Hangartner v. City of Seattle, 151 Wash2d 439, 448 (Wash. en banc., 2004) ("if a requesting party could meet the [law's] requirement of identifying the desired documents by requesting all of an agency's documents, the identification requirement would be essentially meaningless.").

In this case, the State Auditor is a public governmental body and a broad request for "all communications" could be interpreted as seeking all communications of every employee in the agency for the specified time period. The lack of a reasonable specificity for a records request can transform the Sunshine Law from a valuable tool of government transparency and accountability into a weapon for purposes having nothing to do with open government. The requirement of reasonable specificity addresses this kind of issue by requiring the requestor to ask for a "reasonably" identifiable record (e.g., a preliminary draft report sent to a federal agency, See Missouri Prot. & Advocacy Services v. Allan, 787 S.W.2d 291, 293 (Mo. App. W.D. 1990)); a "reasonably" identified set of records (e.g., accident reports with a report date of "August 10, 2004 to and / including August 30, 2004," See State ex rel. Goodman v. St. Louis Bd. of Police Com'rs, 181 S.W.3d 156, 158 (Mo. App. E.D. 2005)); or even a "reasonably" identified category of records (e.g., syllabi that students receive from their professors, See Nat'l Council for Teachers Quality, Inc. v. Curators of Univ. of Missouri, 446 S.W.3d 723, 724 (Mo. App. W.D. 2014)). Even if such records are voluminous, they are records that an agency can locate. Additionally, reasonable specificity about the records sought assist in court review of an agency's action.

Here, this Court finds that the request for all communications of the Auditor for a period of over two years was not reasonably specific. While this lack of specificity may not excuse an

agency from acting on the request, the fact that the SAO did not secure one particular instance of communications data (text messages) within 30 days does not violate the Sunshine Law.

III.

MAF also alleges that the SAO failed to properly preserve records for litigation as required by §610.027.1. That section requires the records custodian to preserve records sought in a Sunshine Law request upon the filing of a civil action. MAF points to the fact that some of the cell phones that may or may not have contained text message data were reset after the suit was filed, and that potentially responsive data was destroyed.

Around the time of service of the lawsuit, the records custodian learned that the cell phones kept messages for 30 days, and older messages could not be recovered. Wood testified that she was satisfied that the information she obtained about these facts was reliable. Accordingly, she did not believe that there were any records (data or otherwise) to preserve from the cell phones. There was no evidence in the case that other records gathered in her searches were not properly preserved.

Whether or not records were properly preserved, the relief MAF requests lies in the penalty provisions contained in sections 610.027.3 and 610.027.4. Each of these sections provides remedies for violations of sections 610.010 to 610.026--not 610.027.

The Court has considered the arguments of MAF seeking some form of redress for the alleged failure to "not transfer custody, alter, destroy, or otherwise dispose of the public record sought to be inspected and examined, . . . until the court directs otherwise." The Court has already found that the form of the records requested did not exist. Given that the action sought production of "native format" files "preserving all metadata" for all electronic data responsive

to the requests, the Court concludes that there has been no loss of any public record[s] which are the subject matter of the civil action. According, section 610.027.1 provides no remedy. This Court has previously ruled that Chapter 109 provides no private right of action.

IV.

Even if one somehow found a technical violation of the Sunshine Law occurred in this case, MAF failed to carry its burden of proving by a preponderance of the evidence that any such violation was knowing or purposeful.

MAF focuses its attention not on the records custodian (Wood), but instead on the general counsel (Paul Harper). MAF argues that Harper is Wood's supervisor, that Harper knew about the 30-day setting on the phones, and that Harper did not tell Wood about the setting.

The Court finds that the SAO followed its typical procedure in the handling of MAF's requests. After notifying certain agency personnel, the search for potentially responsive records is conducted by Wood. Wood consults with Harper if Wood has questions, but thereafter, Harper participates in a legal review with Wood after the records have been collected and before a response is sent out. In essence, Harper, as general counsel, performs the functions of a general counsel. Absent from the record is any evidence that Harper performs the records custodian function or any part of that function.

A "knowing" violation of the Sunshine Law requires proof, by a preponderance of the evidence, that a governmental body knew that it was violating the Sunshine Law in taking its action. Strake v. Robinwood West Cmty. Improvement Dist., 473 S.W.3d 642, 645 (Mo. banc 2015). This standard requires proof that the agency knew that what it was doing violated the Sunshine Law. Laut, 491 S.W.3d at 200. Wood was conducting a search for all communications

in the record-keeping sections of the office systems, and was not aware of "keep messages" settings on phones until after 30 days had passed. Assuming this is a violation of the Sunshine Law, Wood's information came after-the-fact. She cannot be shown to have knowingly violated the Sunshine Law. There is no evidence that Harper was involved in collecting records other than answering questions posed by Wood. None of this evidence shows that Wood--or Harper--would have any reason to believe that they were violating the Sunshine Law.

The failure of proof of a knowing violation of the Sunshine Law defeats any claim for a purposeful violation: Proof of an alleged purposeful violation requires a showing that there was a conscious design, intent, or plan to violate the law with an awareness of the probable consequences. Id., at 262. Even more specifically, "a purposeful violation involves proof of intent to defy the law or achieve further some purpose by violating the law[.]" Laut, 491 S.W.3d at 200. MAF has not alleged any conscious design, intent, or plan. MAF only alleges what MAF believes happened, and then alleges that it happened for a purpose.

Wood was one of only two witnesses to testify live in the hearing. This Court find that her testimony was forthcoming and credible. MAF has failed to meet its burden of proving either a knowing or purposeful violation of the Sunshine Law, assuming that there has been a showing of a violation of the Sunshine Law at all.

This Court finds in favor of Defendant State Auditor Nicole Galloway on all claims asserted by Plaintiff Missouri Alliance for Freedom, Inc., and judgment in favor of Defendant Galloway is entered. Costs taxed to Plaintiff.

SO ORDERED

1-28-2019

JON E. BEETEM, CIRCUIT JUDGE

DATE