

Knowing the teeth of the Sunshine Law

Calls to the hotline regularly come complaining about actions of local government officials either meeting without giving proper notice, discussing improper subjects in closed meetings, or failing to keep proper minutes of meetings, among many other issues. Finding a violation of the Sunshine Law is really a fairly easy task for those of you covering public bodies.

When that happens, we've discussed you can write about it (because the public needs you to be its eyes and ears), and you or any other member of the public can file a complaint online with the Missouri Attorney General's office. Or, of course, you or any member of the public can file a lawsuit. But the problem is that fighting these battles in court can be expensive and courts have been very reticent to award the plaintiffs in these cases payment by the defendants of the plaintiffs' attorneys fees.

It seems clear that if more public bodies were taxed with paying attorneys fees when they are found to have violated the law, then they would be more attentive to what this law requires and more likely to abide by its instructions. Often we find courts get hung up on what the terms knowing and purposeful mean in the context of this law. As a reminder, the definition of "purposely" has existed for some time – in 1998, the Missouri Supreme Court held that more than a mere intent to engage in the conduct resulting in the violation was required. "To purposely violate the open meetings law, a member of a public governmental body must exhibit a 'conscious design, intent, or plan' to violate the law and do so 'with awareness of the probable consequences'."

But what does "knowing" mean? How does that differ from the definition of "purposeful"? The statute does not state a definition. But the Western District Court of Appeals in Kansas City recently added to our understanding of that term in a decision issued in late November. The

American Civil Liberties Union filed suit against the Missouri Department of Corrections seeking names of persons who had applied to witness executions for a twelve-month period. The department's custodian of records responded in a timely manner to the request, and several months later (actually, much later than he had initially indicated the response would take) he provided heavily redacted records. The redactions involved Social Security numbers, which is a valid redaction under state law, but also much other personal information about these individuals for which no proper exception to the Sunshine Law was cited. The ACLU filed suit and a trial court entered judgment for it, awarding access to the records, imposing a \$500 fine and assessing attorneys fees against the department.

The DOC filed an appeal, not arguing against the judgment that it violated the law, but appealing the court's conclusion that this was a "knowing" violation. And in November, the appellate court held that this was indeed a "knowing" violation and sustained the fine and attorneys fees that had been awarded against the department.

The appellate court's holding was based upon the decision of the Missouri Supreme Courts in 2016 where it said a knowing violation by a public body requires evidence of a knowledge of the Sunshine Law of the public body's obligation, accompanied

by evidence that it did not produce the records despite this knowledge.

In this case, the appellate court pointed out that the trial court based its decision upon evidence that the failure to produce records was a knowing violation. Among the evidence cited was that the representative who failed to properly produce the records was an attorney who had worked handling such requests for more five years and that the requests were a "substantial part of [his] duties" for at least two years.

This holding by the court in this decision gives a clear set of instructions for arguing that other violations are "knowing" violations when the custodian of records shows clear knowledge for many years of the requirements in the Sunshine Law and when the public body, through that person's actions,

fails to meet its obligations in producing the requested records.

Perhaps on the basis of this case, this coming year will cause public bodies to pay a bit more attention to their obligations under the Sunshine Law. That would indeed be a Happy New Year for us all!

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