

Paper or digital: An important Sunshine distinction

By the time most of you read this column, you will have already voted in the primary races. That's important because let's look today at a trend that, in part, involves a candidate in a primary race, who may or may not at this point be on the November ballot.

This trend involves civil litigation in our state. For many years, the parties who brought Sunshine Law cases were primarily journalistic entities or maybe corporate entities. Citizens just didn't have the money to pay a lawyer to file a suit to hold a public body accountable. It made public bodies somewhat emboldened when it came to deciding whether to be slipshod in terms of honoring the mandate of Missouri's Sunshine Law.

But in the last couple of years, there have been several entities that have decided to make filing sunshine suits a priority. And a couple of those lawsuits have generated interesting court action this spring.

One involves an appellate opinion regarding Aaron Malin, represented by the American Civil Liberties Union of Eastern Missouri, against ACT Missouri, claiming a violation of the Sunshine Law. There, the appellate court held that the plaintiff was entitled to discovery to determine if the defendant, which claims it is not subject to the Sunshine Law because it is a not-for-profit entity, does indeed fall under the "quasi-public body" portion of the law, and sent the case back down to circuit court for further proceedings.

A second involved John Solomon, represented by The Freedom Center of Missouri, a non-profit organization which says it is involved in public interest litigation. It filed suit on Solomon's behalf in St. Louis City Circuit Court against the St. Louis Circuit Attorney, claiming violation of the Sunshine Law. In late July, the circuit judge held that the defendant had failed to properly answer the lawsuit and therefore granted a default judgment against it. I suspect that case is not final, either.

Finally, Elad Gross, whose name was on the primary ballot in the Attorney General's race, originally filed a suit in 2018 in Cole County against "A New Missouri," a not-for-profit organization, seeking copies of numerous corporate records from them, claiming he was a beneficiary of their bequests. The trial court and then the Western District Missouri Court of Appeals decided that he had not pled facts sufficient to show he was entitled

to these records he sought. Then, this year, he garnered some additional public attention when he filed suit against Gov. Michael Parson, seeking copies of records regarding materials received by the Governor's office from entities he alleged were "dark money" donors. (The petition does not specifically identify what entities he identified in that way, but attached to the petition are copies of his requests, indicating in part he wanted records from "A New Missouri" and various individuals.)

The Governor's office responded requesting additional time for research and indicating the rates to be charged. Additional requests from Mr. Gross followed and eventually the Governor's office told Mr. Gross the cost to produce the records he sought was going to exceed \$3,600. Eventually Mr. Gross filed this lawsuit.

After lengthy proceedings in Cole County, the trial judge held that the Governor's office's response to Mr. Gross was not a violation of the Sunshine Law. Unhappy, Mr. Gross appealed to the Western District Missouri Court of Appeals, citing ten points in his appeal. The appellate court went through all the points and held that four had merit, sending the case back down to the circuit court to consider those four issues.

The case is important to us, even though it is still on appeal, for one major point in the appellate holding. The appellate court distinguished between requests for paper copies of records and requests for electronic copies of records. The court held that the public body CAN charge for attorney search time for paper records but NOT for electronic copies.

That opinion is still subject to change. But in the meantime, if you make a Sunshine Law request, ask for it always to come back to you as electronic copies of electronic records, if available! That will eliminate the claim that the body can charge for attorney review time.

Perhaps having to say that helps make it clear how convoluted that line of reasoning seems to at least one attorney.

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