Sunshine Law for thee, not for me

What is the proper response when the state agency charged with enforcing the state open records law is found to have blatantly violated the Sunshine Law? And, not just accidently, but, as the court clearly sets out, "knowingly" and "purposely"?

Back in 2018, Attorney General Josh Hawley came to Missouri Press Association and asked that we work with his staff in an effort to persuade state legislators to pass a bill creating a "public records counsel" that would serve to represent the public's interest in Sunshine Law disputes. MPA had promoted the concept in the past, but never had an advocate from state government supporting the cause.

Hawley held a press conference and the media coverage was substantial. His staff set meetings with key legislators and came to hearings on the bill they proposed (drafted with MPA's assistance). The initial response to the bill was favorable.

The House passed its version of the bill. That version, and the Senate version, went to a Senate committee to begin the process on that side. But it was late in the session. No Senate hearings were held. At the last minute, House sponsors attempted frantically to amend it on to several Senate bills that were under consideration, but eventually the bill died.

Why is this important? Beyond that effort, there was minimal legislative support from the Attorney General's office for Sunshine Law bills in subsequent years. During Hawley's two-year term of office, according to a review of Case.net records, there were no lawsuits filed by the office of the Attorney General against defendants for violations of the Sunshine Law.

But late last month, two decisions were issued by Missouri circuit courts related to the Sunshine Law. Each is important, but one of them, DSCC (Democratic Senatorial Campaign Committee) versus the custodian of records of the Office of the Attorney General and the AG's office itself, not only fines the AG's office for its Sunshine Law violations and imposes an award of the plaintiff's attorneys fees against the office, but it contains strong language about the actions of Hawley and his staff in regard to these violations.

"The Attorney General's office's 'contradictory, shifting, and post-hoc rationales' for not producing the records support a finding of a knowing and purposeful violation, the Court ruled."

The Court chides the AG's office for the fact that while it admits it located all records responsive to the plaintiff's request within 72 hours, it failed to turn those over to the plaintiff until it was forced to in response to a discovery request, a year and five months after the Sunshine request was made.

After its initial indication it needed more time, the AG's office made no further response to this request. Then, after the lawsuit was filed by the plaintiff, the AG's office suddenly started arguing that these records were closed under Section 610.021 (1), the "litigation" exception.

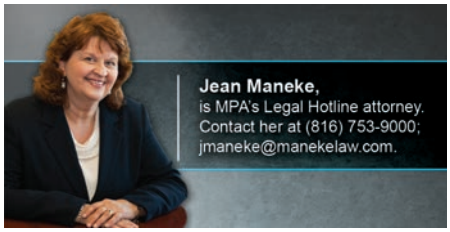
And it was the records custodian who held these emails in his personal email account, rather than having them retained in the records of the AG's office, despite the court concluding that they clearly were records about "public business." The AG's method of operation, the court said, "would allow (the AG) to shield public records merely by storing them offsite. Agencies could deny citizens the open government that the General Assembly sought ... and render the law toothless."

The Court pointed out that Hawley was in the midst of his Senate campaign at this moment. The office's failure to produce these records prevented an opposing party committee from accessing documents that would have damaged Hawley's campaign. The decision to withhold the documents was made by an office employee — one ultimately on the Senator's D.C. staff and thus one with a personal stake in the outcome of the campaign.

This custodian of records had conducted "thousands" of searches, the Court noted. He knew the law. The Attorney General's office's "contradictory, shifting, and post-hoc rationales" for not producing the records support a finding of a knowing and purposeful violation, the Court ruled.

Finally, the court acknowledged that it was imposing the maximum penalty it could impose under the Sunshine Law but found it justified by the AG's obligation "in both educating about and enforcing the Sunshine Law."

Will this decision be appealed? Or will Josh Hawley decide this is irrelevant in regard to his position as a United States Senator (and potential presidential candidate)? Time will tell, but this decision is amazing reading and I highly recommend it!



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