

Missouri Supreme Court case could clarify Sunshine Law 'research' costs

Media lawyers in Missouri are ending this year with a hopeful eye for the future, because an exciting event happened last month! The Missouri Supreme Court has accepted an application filed in it to transfer a case from the Western District Court of Appeals for hearing. It's a decision that could have significant impact on all of us.

This column has in the past covered the case of Elad Gross versus Gov. Michael Parson. Gross, an attorney, filed his original lawsuit in October 2018, in regard to the response he received to a request for records from the Governor's office. He was investigating Missouri nonprofit organizations he believed were using anonymous campaign contributions (i.e.: commonly called "dark money" contributions) to circumvent campaign finance laws and influence the state's government and policy.

His original request of the Governor's office for information on its interactions with these groups received a response that a large number of responses were available but would not be provided until Gross paid the cost of search and copying, determined to exceed \$3000. As the case progressed, Gross was able to determine that a large portion of the cost was related to the charge for attorney review of the documents and determine under the Sunshine Law.

Noting that "research" time is a chargeable expense under the Sunshine Law, the trial judge held that "Research, within the plain meaning of the word, includes efforts by an attorney to review documents for responsiveness, privilege and work product."

Sunshine Law advocates disagreed with that interpretation. Gross filed an appeal in the Western District. Joining him in his appeal as amici were the American Civil Liberties Union of Missouri Foundation, the Freedom Center of Missouri, attorney Mark Pedroli as representative of the Sunshine and Accountability Project, and the Missouri Press Association. That case was argued in April (virtually) and an opinion was issued by the Court in June. That opinion was disappointing.

It had a number of conclusions related to Sunshine Law issues, but the Press Association has been mostly troubled by its conclusions in regard to charges for attorney research time. In that regard, the opinion focused on subsections 1 and 2 in Section 610.026.1. and held that fees for copying paper records (under subsection 1) include charging for "search, research, and duplication time, while fees for copying electronic records (under subsection 2) include only "... the cost of copies, staff time, ... and programming, ... and the cost of" the media on which the copy was placed.

Because it was conceivable that

the response from the Governor's office could have involved both records maintained electronically and maintained in paper format, the Appellate Court addressed both in its opinion.

It held that since subsection 1 allows the body to charge for "search, research and duplication time," that is three separate functions. The legislature must have intended the three words to have different meanings, the Court held, and therefore it adopted a definition for "research" that was beyond the definition of "search" – it held that "research" meant "... studious inquiry or examination; esp: critical and exhaustive investigation...." Noting that there are many reasons a record may be closed, some of which require discretionary review by the public body, and that required attorney review, the appellate court held, determining that it was valid to include attorney time in determining if a record was open or closed as a cost to be charged to the requester of paper copies.

But as to electronic records under subsection 2, the Court held that a public body could only charge for the cost of copies, "staff time" to make the copies, programming and the media on which the copy was placed.

Gross was unhappy with the decision and filed his Application for Transfer in July, and the decision of the Missouri Supreme Court to grant that application came in mid-November. A number of media entities are focusing on having an opportunity to talk with the Missouri Supreme Court by brief as to how these various issues of concern should be addressed. No decision will issue, probably, until sometime in Spring, 2021.

"The trial judge held that 'Research, within the plain meaning of the word, includes efforts by an attorney to review documents for responsiveness, privilege and work product.' ... Sunshine Law advocates disagreed with that interpretation."



Jean Maneke,
is MPA's Legal Hotline attorney.
Contact her at (816) 753-9000;
jmaneke@manekelaw.com.