The legal costs for Sunshine requests

The problems of reporters seeking access to public records are many. You know them all. Your requests get ignored or the response is slow. The public body claims the records are closed, but no valid exception is named. Or, as is often the case, the cost to do the search and make copies of the records exceeds your budget. All of these diminish public access.

There are no easy solutions. Until real penalties for failure to respond exist, some public officials will not meet the law's time requirements. Costs for copies will continue to be an issue. Journalists have learned to request electronic copies rather than paper copies in an effort to keep down the cost of photocopies. Staff time to find records can be reduced if journalists work more closely with public bodies to narrow the search request terms. But at times, journalists fear being too specific in a request, thus tipping off the public body about the subject of the story being written.

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And then there is one component of the cost that has been an uncharted issue for some time – the cost for attorneys to review requested records to determine if they are open to the public or if they are subject to closure under the exceptions in Section 610.021. With all apologies to my profession, the cost of having an attorney review anything is significant.

For some time, I've wished for a case with facts that would allow bringing the issue of who pays for that review before a judge. It can be hard to find the right case when you have a specific issue. But a year ago, I realized I had a case with a set of facts where this was going to be an issue the court could be asked to address. And as I worked on a motion for summary judgment in that case, I added that issue to the ones on which I wanted a court ruling.

Some public bodies believe the cost to review these for closure was part of the "search" costs and thus chargeable to the public. But I have argued that the Sunshine Law language is clear – public bodies are required to make the determination at the time records are created whether they were closed or open – it is the duty of the public body to segregate what is closed from what is open. That language is set out in Section 610.024.1, where a public body, after voting to close records (see 610.022) must maintain those records which are closed separate from open records.

Yes, public bodies may charge for research time, but research is defined in dictionaries as searching and identifying records. Case law in Missouri previously had not clearly addressed this issue, although there are references in several cases that hinted that the public body had this obligation. But in my client's motion for summary judgment on this issue, we argued that the language in the Sunshine Law clearly said that this separation of open from closed records should have happened at the time the records were created, that the law says that records should be stored so that it is easy to separate the open records from the closed records and if they have all been stored together and the separation doesn't occur until a request is made, then it is the public body that must bear the cost to separate open records from closed records.

We were in the St. Louis County Circuit Court and the judge (Judge Barbara W. Wallace, who has since retired) ruled in early January 2017. And her ruling was clear that we were correct in our argument about this issue. "Plaintiff is responsible for the costs of electronically searching the records to determine which may contain information relevant to Plaintiff's request. These costs can include the staff cost for time spent searching the records, the cost of any medium used for duplication of the records, and any programming costs to retrieve the records including the actual programming costs required beyond the customary and usual level to comply with a request for records or information. Defendant is responsible for the costs incurred in having an attorney review the records to determine if the records contain confidential or privileged communication or work product," the Judge held.

Now the sad news. The defendant has not chosen to appeal this judgment, and so no appellate court opinion will exist on this issue. Circuit court opinions are only of precedence in the county where they were rendered, as opposed to appellate decisions, which may be used in other counties in that district (or, even elsewhere throughout the state) as offering important precedence to other judges. So this decision has limited value.

But I continue to argue that the basis which caused this judge to side with this interpretation is correct and will be upheld in the future. That day will yet come!

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