Sunshine cases improve rights of records requesters

In late 2015, there were two Sunshine Law cases decided by Missouri courts that have definitely strengthened the rights of requesters to access records. Both cases relate to the issue of a purposeful violation of the law. One is a strong example of a holding that an intentional act to violate the law is wrong. The other opens the door for a second example of the same scenario.

The first case involved a citizen who sent a request to a community improvement district in which he resided, seeking documents related to its settlement of a personal injury case. The district reviewed those documents, determined they contained a clause that release of the information would void the settlement, and, on advice of counsel, decided to not disclose those papers.

> *"These cases show the difficulties a member of the public has in getting hold of a purposeful violation by a public body when a sunshine law case is filed."*

The Sunshine Law is clear that a settlement agreement must be a public record upon final signing, unless the body goes to court to get a court order closing it. Even then, the amount paid must be made public. The district's attorney should have not allowed the non-disclosure clause in the agreement, but once it was there, the district had a hard choice to make — releasing the information would leave them open to a claim they had violated the agreement clause, but the Sunshine Law made it also clear that the document was an open record.

When the district consulted its attorney about responding to the sunshine request, that attorney acknowledged that releasing the records would breach the non-disclosure agreement, and also acknowledged that the Sunshine Law required the record be open. The solution, the attorney recommended, was to refuse to release the agreement until a court ordered it to release the paperwork.

That was not a solution the court liked. Clearly, the attorney's advice to the district was that it was required to release the record. The district had actual knowledge of its status under the Sunshine Law. Therefore, this constituted a "conscious design" or "plan" to violate the law, the court said.

Further, the court ordered the case sent back down to the lower court to address the citizen's request to be paid his attorneys' fees. (This case is Strake v. Robinwood West Community Improvement District, and was decided by the Missouri Supreme Court.)

In the other case, two persons who had relationships with employees of a city's police department filed a sunshine lawsuit seeking records of an internal affairs investigation that related to those affairs. Specifically, they were looking for reports of the police department's use of the REJIS system (the law enforcement database of confidential records). The city responded that there were no incident reports or arrest records, only an internal affairs report, which it claimed was exempt as "personal information," and closed under 610.021 (3).

Once litigation was started, the city disclosed that an internal affairs investigation was undertaken to determine if the plaintiffs were fit to perform their duties. The lower court agreed that these records were internal affairs reports and were exempt. However, the appellate court noted that the charges being investigated were criminal charges and therefore it was possible that the record sought was both an internal affairs report and an investigative record, which would require that the report be made public due to the dual status of the record and prior court holdings that openness is required if a record can be both closed and open.

Once the trial court reviewed the record, it held that the "internal affairs" record was truly an investigative report and must be disclosed. Then the plaintiffs sought an award of attorney fees under the theory that this was a "purposeful" violation. However, the appellate court, in reviewing what happened in the trial court, found that just because the city's interpretation of the law was wrong, it did not mean the city had a "conscious plan" to violate the law.

However, in an unusual move, this second case was transferred by the appellate court on its own volition to the Missouri Supreme Court. It is still pending there. Given that there is evidence that the city realized this was a criminal investigation record that should have been made public, it is possible that the appellate decision that it was not "purposeful" will be overturned. I expect an opinion on this case sometime in the spring or early summer and its outcome will be quite interesting, given the Strake opinion. (This case is Laut v. City of Arnold.)

If anything, these two cases show the difficulties a member of the public has in getting a hold of a purposeful violation by a public body when a Sunshine Law case is filed. For a long time, there have been very few examples of such violations to use as a standard. Strake gives us one example. Perhaps soon we'll have another.

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