MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ELAD GROSS

APPELLANT,

v.

MICHAEL PARSON, ET AL.

RESPONDENTS.

DOCKET NUMBER WD83061

DATE: May 26, 2020

Appeal From:

Cole County Circuit Court
The Honorable Patricia S. Joyce, Judge

Appellate Judges:

Division Two: Mark D. Pfeiffer, Presiding Judge, Alok Ahuja, Judge and Gary D. Witt, Judge

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Attorneys:

Elad J. Gross, St. Louis, MO, for appellant.

Jeremiah Morgan, Jefferson City, MO, for respondents.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ELAD GROSS, APPELLANT,
v.
MICHAEL PARSON, ET AL., RESPONDENTS.

WD83061 Cole County

Before Division Two Judges: Mark D. Pfeiffer, Presiding Judge, Alok Ahuja, Judge, and Gary D. Witt, Judge

Elad Gross ("Gross") appeals from the Circuit Court of Cole County's entry of judgment on the pleadings against Gross and in favor of Governor Michael Parson ("Governor Parson") and Michelle Hallford ("Hallford") (collectively "Governor's Office"). Gross raises ten allegations of error regarding the trial court's rulings on two separate requests for public records under Section 610.010 *et seq* (commonly referred to as Missouri's "Sunshine Law") sent by Gross to the Governor's Office (respectively, "First Sunshine Request" and "Second Sunshine Request").

REVERSED AND REMANDED.

Division Two holds:

(1) The circuit court did not err in dismissing Gross's case on the basis that the Governor's Office violated the Missouri Constitution and the United States Constitution in denying Gross's request that the Governor's Office waive or reduce fees associated with his First Sunshine Request. Because Gross did not raise any constitutional challenges or cite to any constitutional provisions in his petition or at any other point before the trial court, he waived review of his constitutional claims.

(2) The circuit court erred in dismissing Gross's claim on the pleadings that the Governor's Office impermissibly charged attorneys' research fees as a requirement to access public records related to his First Sunshine Request. The Governor's Office was permitted to charge for "research time" under section 610.026.1(1) but not pursuant to section 610.026.1(2). Because the circuit court must determine which records were documents governed by subsection (1) and which records were electronic records governed by subsection (2), as well as what fees were being assessed for each type of record, whether the Governor's Office assessed an improper fee as to either type of record, and if any fee was charged at an excessive rate, there existed factual questions that preclude a judgment on the pleadings.

(3) The circuit court did not err in entering judgment on pleadings on Gross's claim that the Governor's Office violated the Sunshine Law when it failed to provide Gross with a

specific date for the earliest time the requested records would be available. Gross's First Sunshine Request asked the Governor's Office to provide notice regarding the cost of production and the number of records responsive to each request before it began the process of copying and producing the records. Because the First Sunshine Request on its face required further action on Gross's part before the Governor's Office could begin to respond to the request, there was no way it could provide him with a specific date on which the records would be available. The Governor's Office responded in the best way possible under the parameters set by Gross's request.

(4) The circuit court did err in entering judgment on the pleadings on Gross's claim that the Governor's Office failed to provide Gross with a detailed explanation of why the Governor's Office required at least 120 business days to produce records sought in Gross's First Sunshine Request. Section 610.013.3 requires the custodian of the requested records to provide such an explanation if access is not granted by the end of the third business day following the date the request is received. Although the Governor's Office provided an explanation on appeal, it was not given to Gross when requesting the records and as such, Gross has sufficiently pled that the Governor's Office failed to provide the statutorily required "detailed explanation" for the delay.

(5) The circuit court erred in failing to conduct the necessary review prior to dismissing Gross's claim that the Governor's Office impermissibly redacted portions of the records provided to Gross in response to Gross's Second Sunshine Request without explanation and without closing any records. The Governor's Office bears the burden to establish that the redacted material fell within section 610.021(1) and are protected as attorney-client privilege such that the communications would be permissibly closed to all requestors and yet the Governor's Office provided no legal reason for the redaction and the circuit court failed to review the redacted material *in camera*.

(6) The circuit court erred in entering judgment on the pleadings on Gross's claim that the Governor's Office failed to comply with Gross's Second Sunshine Request because it impermissibly placed the burden on Gross to demonstrate the Governor's Office's noncompliance. Section 610.027.2 places the burden on the Governor's Office to prove it complied with the Sunshine Law, and in so doing the subsection places the burden on the Governor's Office to request an *in camera* review of the redacted materials. Because the circuit court failed to review the redacted content to determine if it was properly redacted under the statute, it acted prematurely in entering judgment on the pleadings.

(7) The circuit court did not err in dismissing Gross's claim that the Governor's Office knowingly violated the Sunshine Law in processing his First Sunshine Request because Gross failed to pay the estimated cost, and therefore, the Governor's Office did not have a current obligation to produce the requested records. Additionally, it was not a knowing violation for the Governor's Office not to waive its fees because any waiver of fees is discretionary.

(8) The circuit court did err in dismissing Gross's claim that the Governor's Office knowingly violated the Sunshine Law in processing his Second Sunshine Request because Gross

sufficiently pled that the redaction was improper and pled all three elements that the Governor's Office knowingly violated the Sunshine Law in regards to his Second Sunshine Request. Questions of fact remain regarding whether the redactions in the Second Sunshine Request were permissible under section 610.021 or if Gross can factually establish at trial that the redactions were knowingly impermissible.

(9) The circuit court did not err in dismissing Gross's claim that the Governor's Office purposefully violated the Sunshine Law in processing his First Sunshine Request. Because Gross failed to plead essential facts to demonstrate a knowing violation of the Sunshine Law as it pertains to his First Sunshine Request, we need not address whether he pled essential facts to demonstrate the higher burden of establishing a purposeful violation.

(10) The circuit court did not err in dismissing Gross's claim that the Governor's Office purposefully violated the Sunshine Law in processing his Second Sunshine Request. Gross did not plead any facts to indicate the Governor's Office was aware that Gross had incurred substantial costs pertaining to the Second Sunshine Request. Gross's bare assertions that he "suffered delay in his investigation into corruption in Missouri government[] and has undertaken substantial costs to enforce Missouri's Sunshine Law" were insufficient to alleged a purposeful violation of the Sunshine Law as it pertains to the Second Sunshine Request.

Judge Ahuja concurs:

Judge Ahuja concurs in the result, and in all of the court's opinion, except for its discussion of the fees which an agency may charge for attorney time. Because this case involves only records which will be produced in electronic format, in Judge Ahuja's view it is unnecessary to decide whether attorney time may be charged under section 610.026.1(1), RSMo. Under section 610.026.1(2), Judge Ahuja believes that a requester may be charged for attorney time necessary to respond to a Sunshine Law request, since that attorney work constitutes "staff time" for which charges are allowed. Under section 610.026.1(2), however, the agency's charge for such time may not exceed "the average hourly rate of pay for staff of the public governmental body required for making copies." Because it appears that the Governor's Office charged Gross for attorney time at a substantially higher hourly rate, Judge Ahuja agrees that the grant of judgment on the pleadings to the Respondents on this issue must be reversed.

Majority Opinion by: Gary D. Witt, Judge May 26, 2020
Mark D. Pfeiffer, Presiding Judge, concurs
Concurring Opinion by: Alok Ahuja, Judge

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