Summary of SC98619, *Elad Gross v. Michael Parson, et al.*
Appeal from the Cole County circuit court, Judge Patricia Joyce
Argued and submitted February 3, 2021; opinion issued June 29, 2021

Attorneys: Elad Gross, of St. Louis, (314) 753-9033, represented himself. The state was represented by Jeremiah J. Morgan and R. Jake Schmidt of the attorney general's office in Jefferson City (573) 751-3321.

This summary is not part of the opinion of the Court. It is provided by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man appeals from the circuit court's judgment on the pleadings in favor of the governor's office on the man's claims that the governor's office violated the state's open records statute, known as the sunshine law. In 6-0 decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri vacates the judgment and remands the cause. The governor's office was not entitled to judgment as a matter of law in that the man's pleadings were sufficient to allege violations of the sunshine law.

Facts: In 2018, Elad Gross sent a sunshine request to the governor's office requesting records related to campaign contributions. The governor's office informed Gross his request yielded approximately 13,650 documents, would cost $3,618.40 to produce and could take up to 120 business days to provide. An invoice attached to the response showed a $40 per hour research/processing charge. Gross requested the fees be waived but alternatively asked for an explanation of the $40 per hour charge. He further challenged the amount of time it would take to complete his request. Gross then made a second sunshine request in which he requested all records pertaining to the governor's office's response to his first sunshine request. In response to the second sunshine request, the governor's office provided Gross approximately 60 pages, some of which had been redacted. Gross subsequently sued the governor and the custodian of records for the governor's office (collectively, the governor's office) alleging they knowingly and purposefully violated Missouri's sunshine law. In particular, Gross alleged the governor's office charged excessive fees by charging him for attorney review time and failed to comply with the statutory requirements for explaining any redactions or delays in providing the requested documents. The governor's office denied the allegations and filed a motion for judgment on the pleadings. Following a hearing, the circuit court sustained the motion and dismissed the action. Gross appeals.

VACATED and REMANDED.

Court en banc holds: (1) The sunshine law does not authorize a public governmental body to charge for attorney review time. Although section 610.026.1, RSMo authorizes fees for "research time" and "staff time," attorney review time does not fall into either category. Section 610.026.1(1), RSMo, does not authorize a public governmental body to charge for any and all research time; rather, it authorizes a charge for a certain subset of research time – that required for fulfilling public records requests. Because the sunshine law obligates a public governmental body to separate exempt and non-exempt materials without regard to any particular records

request, attorney review time to determine whether responsive documents contain privileged information it is not research time required for fulfilling records requests. Likewise, attorney review does not constitute staff time under section 610.026.1(2), RSMo. For purposes of the sunshine law, staff time is the time required to provide access to public records maintained on computer facilities, recording tapes or disks, videotapes or films, pictures, maps, slides, graphics, illustrations or similar audio or visual items, which may include programming, and to make paper copies larger than nine by fourteen inches. Attorney review time has no relation to providing such access.

(2) The governor's office was not entitled to judgment on the pleadings on Gross's claim that the governor's office violated the sunshine law by failing to provide him with the earliest date records would be available for inspection. The governor's office did not provide the earliest time and date the records would be available for inspection; instead, the governor's office provided Gross with a time estimate of 120 business days from payment rather than the exact calendar date upon which he could inspect the requested records.

(3) The governor's office was not entitled to judgment on the pleadings on Gross's claim the governor's office violated the sunshine law by failing to provide him with a detailed explanation as to why it would require at least 120 business days to fulfill his request. Section 610.023.3 prescribes a mandatory duty to provide a detailed explanation as to the cause for delay if access to records is not immediately granted. While the governor's office now asserts the 120-day estimate was because Gross's request was voluminous and complex, such an explanation was not provided in the response to Gross's request.

(4) The governor's office was not entitled to judgment on the pleadings on Gross's claim the governor's office violated the sunshine law when it failed to provide an explanation as to why certain records in his second sunshine request were redacted. Section 610.024.2, RSMo, requires a governmental body to generally describe the material exempted unless doing so would reveal the contents of the exempted information. The governor's office provided Gross with no explanation as to why portions of the records were redacted and did not allege the records were closed for any reason. While redaction of privileged attorney-client communication is permitted under the sunshine law, that does not mean the information redacted from Gross's request was, in fact, properly redacted.

(5) Pursuant to section 610.027.2, RSMo, the burden of persuasion is on the governmental body to demonstrate compliance with the sunshine law requirements once a requester demonstrates records are subject to the sunshine law. The circuit court, therefore, misapplied the law by improperly shifting the burden of persuasion to Gross by concluding he was required to plead "more" to establish a violation with respect to the governor's office redaction.

(6) Gross sufficiently pleaded the governor's office committed knowing violations of the sunshine law with respect to both sunshine requests. A knowing violation requires a party to establish the alleged violator knew that the conduct in question violated the sunshine law. Gross alleged he informed the governor's office of the requirements of the sunshine law, the governor's office knew the sunshine law requirements, and yet it repeatedly refused to abide by them in handling his requests. These allegations together with the facts related to his records requests –

that the governor's office charged $40 per hour for research/processing time, failed to provide the earliest date records would be available, failed to provide a detailed explanation of the cause for delay, and failed to provide an explanation for the redaction – support a reasonable inference the governor's office knew it was violating the sunshine law when it took the challenged actions.

(7) Gross sufficiently pleaded the governor's office purposefully violated the sunshine law with respect to his first and second sunshine requests. A public governmental body purposely violates the sunshine law when it exhibits a conscious design, intent, or plan to violate the law and does so with awareness of the probable consequences. Gross alleged the governor's office repeatedly refused to abide by the sunshine law requirements to delay the release of information that may implicate the governor's office in a scheme to circumvent Missouri campaign finance law and delay the release of information that may have implicated donors to Josh Hawley's senatorial campaign. These allegations are sufficient to allege the governor's office had an intent to violate the sunshine law.

(8) Gross failed to preserve his constitutional claims regarding reduction or waiver of fees. Constitutional claims must be raised at the earliest opportunity to be preserved for appellate review. Gross never alleged before the circuit court that the governor's office violated the Missouri and federal constitution law by acting arbitrarily and capriciously in denying his request for the waiver or reduction of fees associated with his first sunshine request. Accordingly, this Court cannot review such claims on appeal.