In the
Missouri Court of Appeals
Western District

SHOW-ME INSTITUTE, ET AL.,	)	
	)	
Appellants,	)	**WD84561**
	)	
v.	)	**OPINION FILED: March 29, 2022**
	)	
OFFICE OF ADMINISTRATION, BRANDI CARUTHERS, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES COUNCIL 61, AND DANNY HOMAN,	)	
	)	
Respondents.	)	

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon Edward Beetem, Judge

Before Division Four: Cynthia L. Martin, Chief Judge, Presiding, Thomas N. Chapman, Judge and W. Douglas Thomson, Judge

The Show-Me Institute and Patrick Ishmael ("Ishmael"), an employee of the Show-Me Institute, (collectively "Appellants") appeal from the trial court's entry of summary judgment in favor of the Missouri Office of Administration ("Office of Administration") and Brandi Caruthers ("Caruthers") in her official capacity as the designated custodian of records for the Office of Administration's Division of Personnel (collectively

"Government"). The Appellants assert that the trial court's judgment: (1) violated the policy underlying the Sunshine Law[1] by allowing the Government to withhold unredacted copies of public records from the Appellants that the Government had previously treated as open by providing them to another private entity; and (2) misapplied section 610.023.2 of the Sunshine Law by allowing the Government to grant one private entity an exclusive right to access and disseminate certain public records. Finding no error, we affirm.

Factual and Procedural History[2]

On August 28, 2019, the Appellants filed a petition against the Government in the Circuit Court of Cole County. The American Federation of State, County, and Municipal Employees Council 61 ("AFSCME") and Danny Homan ("Homan") (collectively "Intervenors") sought to intervene in the proceedings, and the trial court granted the request. After obtaining leave from the trial court, the Appellants filed an amended petition ("Amended Petition") on February 25, 2020.

The Amended Petition asserted that the Government knowingly violated the Sunshine Law by refusing to provide the Appellants unredacted copies of lists of active bargaining unit employees that the Government had already provided to AFSCME

[1]Section 610.010 *et seq.* All statutory references are to RSMo 2016, as supplemented through the date of the Appellants' Sunshine Law requests, unless otherwise indicated.

[2]When reviewing the entry of summary judgment, we view the record in the light most favorable to the party against whom the judgment was entered and accord the non-movant all reasonable inferences from the record. *Green v. Footoohighiam*, 606 S.W.3d 113, 116 (Mo. banc 2020).

"Facts come into a summary judgment record only via Rule 74.04(c)'s numbered-paragraphs-and-responses framework." *Stanton v. City of Skidmore*, 620 S.W.3d 245, 254 (Mo. App. W.D. 2021) (quoting *Fleddermann v. Casino One Corp.*, 579 S.W.3d 244, 248 (Mo. App. E.D. 2019)). When reviewing the entry of summary judgment, we may only review the uncontroverted material facts established by the procedure set forth in Rule 74.04(c). *Id.* Accordingly, we have compiled the factual background from the properly supported uncontroverted facts identified in the summary judgment pleadings.

All rule references are to the *Missouri Court Rules, Volume I - State* (2020), unless otherwise indicated.

("Unredacted Excel Files"). The Amended Petition alleged that AFSCME and the Government entered into a Master Labor Contract[3] in which the Office of Administration agreed to provide AFSCME a "current list of active bargaining unit employees" once a quarter, and that the Government provided AFSCME such lists in the form of the Unredacted Excel Files, which included each employee's name, employment status, salary information, work address, home address, and mailing address. The Appellants alleged that when Ishmael requested electronic copies of the Unredacted Excel Files for 2016, 2017, and 2018, the Government sent Ishmael redacted versions ("Redacted Excel Files"), explaining that the redactions had been made pursuant to section 610.021(13) and Office of Administration policy B-36. The Amended Petition argued that even though section 610.021(13) authorized closing the redacted information, because the Government had already provided the redacted information to AFSCME, the Government was required by the Sunshine Law to treat that information as open for all purposes. The Amended Petition alleged that, because the Government refused to provide Ishmael with the Unredacted Excel Files, the Government knowingly violated section 610.023.2's prohibition against granting an exclusive right to access and disseminate public records.

After the Government and the Intervenors filed their respective answers, the Appellants filed a motion for summary judgment ("Appellants' Motion for Summary Judgment"), claiming that uncontroverted material facts established that the Government refused to provide public records, specifically the Unredacted Excel Files, in violation of

[3]AFSCME Council 72 was the original party to the Master Labor Contract, but during the term of the contract, AFCME Council 72 merged with and into AFCME Council 61. For ease of reference, we refer to AFSCME Council 72 and Council 61 collectively as "AFSCME."

section 610.023.2's prohibition against granting any person or entity an exclusive right to access and disseminate public records. The Appellants' Motion for Summary Judgment identified two legal issues: (1) whether "the Sunshine Law allow[s] a public governmental body to treat as 'closed' public information it has already made available to one or more private entities"; and (2) whether "a public governmental body violate[s] [section] 610.023.2 . . . by granting one or more private entities access to public records, but then refusing to provide other private entities access to the same public records." The Appellants' Motion for Summary Judgment asserted a right to judgment as a matter of law because "(1) the state policy in favor of transparency does not authorize selective closure of open public records, and (2) [section] 610.023.2 . . . forbids public governmental bodies to grant any private person or entity the exclusive right to access and disseminate public records."

The Government filed a motion to strike the Appellants' Motion for Summary Judgment ("Motion to Strike"), and the Intervenors filed suggestions in opposition.[4] The Government's Motion to Strike asked the trial court to strike either the Appellants' Motion for Summary Judgment in its entirety or alternatively, various unauthenticated exhibits, noncompliant statements of uncontroverted fact, and legal assertions. The Motion to Strike also sought leave to file a substantive response to the Appellants' Motion for Summary Judgment, if necessary, following a ruling on the Motion to Strike.

[4]"[A] motion to strike is a 'response' to a motion for summary judgment that is contemplated by Rule 74.04." *Jungmeyer v. City of Eldon*, 472 S.W.3d 202, 205 (Mo. App. W.D. 2015).

While the Appellants' Motion for Summary Judgment and the Government's Motion to Strike were pending, the Appellants filed correspondence ("Appellants' Letter") on January 19, 2021. Appellants' Letter addressed the trial court's entry of judgment in *United for Missouri, et al. v. Office of Administration, et al.*, Case No. 19AC-CC00398, which concerned a substantially identical request for the records at issue in the instant case. In the *United for Missouri* judgment, the trial court concluded that the terms of the Master Labor Contract that required the Office of Administration to provide a current list of all active bargaining unit employees to AFSCME did not constitute an "exclusive" right to access such records in violation of section 610.023.2. The Appellants' Letter conceded that the trial court "would be virtually certain to reach the same result in the [instant] case" so that "it seems advisable for the [trial court] to swiftly resolve the [instant] case so that the [Appellants could] move on to argue their position before the Court of Appeals."[5]

On February 25, 2021, the Government filed a motion for summary judgment, ("Government's Motion for Summary Judgment"), arguing that the uncontroverted facts established as a matter of law that the Government complied with the requirements of the Sunshine Law. The Government's Motion for Summary Judgment asserted that the Government's compliance with the terms of the Master Labor Contract did not grant AFSCME the exclusive right to access and disseminate the Unredacted Excel Files. The Government's Motion for Summary Judgment also sought partial summary judgment on the basis that the Amended Petition sought remedies that were outside the scope of those

[5]The *United of Missouri* judgment was appealed to this Court and assigned case number WD84305. That appeal was then dismissed at the appellants' request.

authorized by section 610.027.5. The Appellants' response to the Government's Motion for Summary Judgment admitted most of the Government's uncontroverted facts, but disputed the materiality of those facts given the legal issues framed by the Appellants' Motion for Summary Judgment.

The trial court entered its judgment and order ("Judgment") on May 26, 2021. The Judgment sustained the Government's Motion for Summary Judgment, denied the Appellant's Motion for Summary Judgment, and denied all other pending motions as moot. The Judgment concluded that "the terms of the Master Labor Contract that provide for the provision of information to AFSCME do not constitute an 'exclusive' right to access the closed records." The Judgment further concluded that the Government's "provision of unredacted records to AFSCME and subsequent refusal to provide [the Appellants] unredacted copies of the same" did not establish that the Government, in contravention of section 610.023.2, granted AFSCME an exclusive right to access and disseminate the Unredacted Excel Files. The Judgment concluded that "to hold otherwise would radically alter public governmental bodies' duties under the Sunshine Law--creating out of whole cloth an eternal and binding waiver out of the discretionary decision governmental bodies are statutorily[]authorized to make in response to each Sunshine Law request for records." The Judgment noted that, to the extent the Appellants "believe that the Sunshine Law *should* prohibit the conduct complained of in this matter, they must seek relief from the legislative branch." Finally, the Judgment noted that the Appellants' position that the Government knowingly violated the Sunshine Law was in direct conflict with the

Appellants' acknowledgment that the case presented an issue of first impression. No post-judgment motions were filed.

The Appellants appeal.[6]

Standard of Review

We review the grant of summary judgment *de novo*. *Estes as Next Friend for Doe v. Bd. of Trs. of Mo. Pub. Entity Risk Mgmt. Fund*, 623 S.W.3d 678, 686 (Mo. App. W.D. 2021). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Rule 74.04(c)(6). In determining whether the entry of summary judgment was appropriate, we "review[] the record in the light most favorable to the party against whom judgment was entered, and give[] the non-movant the benefit of all reasonable inferences from the record." *Estes as Next Friend for Doe*, 623 S.W.3d at 686 (quoting *Truman Med. Ctr., Inc. v. Progressive Cas. Ins. Co.*, 597 S.W.3d 362, 365-66 (Mo. App. W.D. 2020)). A defending party, such as the Government, is entitled to summary judgment if it demonstrates one of the following:

> (1) facts negating any one of the claimant's elements necessary for judgment; (2) that the claimant, after an adequate period of discovery, has not been able to--and will not be able to--produce evidence sufficient to allow the trier of fact to find the existence of one of the claimant's elements; or (3) facts necessary to support his properly pleaded affirmative defense.

[6]The Appellants filed their notice of appeal on June 1, 2021, within ten days of the trial court's entry of the Judgment. The Judgment did not become final upon its entry, though. Judgments are not final for purposes of appeal until at least thirty days after their entry. *See* Rules 75.01 (providing that the trial court retains control over a judgment for thirty days after its entry); 84.01(a) (providing that the notice of appeal must be filed within ten days of the judgment becoming final); 81.05(a)(1) (providing that, if no authorized after-trial motion is filed during the thirty days during which a trial court retains control over the judgment, the judgment becomes final at the expiration of those thirty days). Rule 81.05(b) provides that, if a notice of appeal is filed prematurely, we deem the notice of appeal filed at the time the judgment became final for purposes of appeal.

JTB Props., LLC v. Zwillenberg, 626 S.W.3d 255, 262 (Mo. App. W.D. 2021) (quoting *Daniels v. Terranova*, 611 S.W.3d 799, 806 (Mo. App. W.D. 2020)).

The Appellants do not argue that material facts in dispute precluded the entry of summary judgment in favor of the Government. Instead, the Appellants argue that despite uncontroverted facts, the entry of summary judgment in favor of the Government was not proper as a matter of law. "We will affirm the trial court's granting of summary judgment if it is correct as a matter of law on any grounds." *Id.* at 261 (quoting *Behrick v. Konert Farms Homeowners' Ass'n*, 601 S.W.3d 567, 573 (Mo. App. E.D. 2020)).

Analysis

The Appellants assert two points on appeal challenging the trial court's grant of summary judgment in favor of the Government. The first point on appeal broadly argues that the Judgment is contrary to the policy underlying the Sunshine Law because it allowed the Government to withhold the Unredacted Excel Files from Appellants after the same information had been provided to AFSCME. Appellants acknowledge in connection with this point on appeal that although the information redacted in the Redacted Excel Files was permissibly subject to closure pursuant to section 610.021(13), that information became permanently open (and no longer subject to closure) when it was provided to AFSCME in the Unredacted Excel Files. The Appellants' second point on appeal narrowly argues that the Judgment misapplied the law because section 610.023.2 prohibited the Government from granting AFSCME the exclusive right to access and disseminate the Unredacted Excel Records. We address the points in reverse order.

"Missouri's Sunshine Law is meant to foster openness and transparency in government." *City of Byrnes Mill v. Limesand*, 599 S.W.3d 466, 471 (Mo. App. E.D. 2020). "It is the public policy of this state that . . . records . . . of public governmental bodies be open to the public unless otherwise provided by law," so that "all public records of public governmental bodies shall be open to the public for inspection and copying" unless otherwise provided by law. Section 610.011.1 & .2; *see also* section 610.023.2 ("Each public governmental body shall make available for inspection and copying by the public of that body's public records."). Public records are subject to permissive exemptions set forth in section 610.021, though. *Petruska v. City of Kinloch*, 559 S.W.3d 386, 388 (Mo. App. E.D. 2018). Section 610.021(13) permits, but does not require, a public governmental body to close records that relate to "[i]ndividually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such." *See also Chasnoff v. Mokwa*, 466 S.W.3d 571, (Mo. App. E.D. 2015) (recognizing that the exemptions in section 610.021 give a public governmental body the discretion to close certain public records).

The Amended Petition acknowledged that section 610.021(13) authorized the Government to close the individually identifiable personnel information redacted from the Unredacted Excel Files, and that Office of Administration Policy B-36 requires "[i]individually identifiable personnel records" to be closed unless disclosure is required by law. The Amended Petition broadly asserted, however, without citation to any provision

of the Sunshine Law, that once the Unredacted Excel Files were provided to AFSCME, the Office of Administrative forever waived its ability to treat the "[i]ndividually identifiable personnel records, performance ratings or records pertaining to [employment]" contained within the Unredacted Excel Files as closed pursuant to section 610.021(13). The Amended Petition also narrowly asserted that by providing the Unredacted Excel Files to AFSCME but only the Redacted Excel Files to the Appellants, the Government granted AFSCME the exclusive right to access and disseminate public records in violation of section 610.023.2. The Judgment expressly rejected both assertions.

The Judgment concluded that the terms of the Master Labor Contract that required the Government to provide information to AFSCME that could have been closed pursuant to section 610.021(13) do not violate section 610.023.2. This was not legally erroneous.

In 1998, the General Assembly amended section 610.023.2 to include the following: "No public governmental body shall, after [August 28, 1998], grant to any person or entity, whether by contract, license or otherwise, the exclusive right to access and disseminate any public record unless the granting of such right is necessary to facilitate coordination with, or uniformity among, industry regulators having similar authority."[7] Construction of this newly added language is an issue of first impression.

[7]The General Assembly added the prohibition against granting an exclusive right to access and disseminate public records following our decision in *Deaton v. Kidd*, 932 S.W.2d 804 (Mo. App. W.D. 1996). In *Deaton*, we held that the Director/Revisor of Statutes' practice of selling the Missouri Revised Statutes on computer tape to the highest bidder who would later market the Missouri Revised Statutes to the public conflicted with the public's right to access to public records for inspection and copying required by section 610.023 of the Sunshine Law. *Id.* at 807. In effect, the General Assembly's 1998 amendment of section 610.023.2 codified the *Deaton v. Kidd* decision into the Sunshine Law.

"The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning" unless a statutory definition is applicable. *Dickemann v. Costco Wholesale Corp.*, 550 S.W.3d 65, 68 (Mo. banc 2018) (quoting *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988)). If a term is not defined by statute, we look to the dictionary for its plain and ordinary meaning. *Hegger v. Valley Farm Dairy Co.*, 596 S.W.3d 128, 131-32 (Mo. banc 2020). "If the language of a statute is plain and unambiguous, [we are] bound to apply that language as written and may not resort to canons of construction to arrive at a different result." *State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 605 (Mo. banc 2019).

Section 610.023.2's prohibition against granting an exclusive right to access and disseminate public records is plain and unambiguous. Section 610.023.2 prohibits: (1) a public governmental body, statutorily defined in section 610.010(4) as "any legislative, administrative or governmental entity created by the Constitution or statutes of this state, by order or ordinance of any political subdivision or district, judicial entities when operating an administrative capacity, or by executive order"; (2) from granting, defined in *Black's Law Dictionary* as "giv[ing] or confer[ring] (something), with or without compensation"; (3) any person or entity; (4) whether by contract, license, or otherwise; (5) the exclusive, defined in *Black's Law Dictionary* as "[l]imited to a particular person, group, entity, or thing"; (6) right to access and disseminate[8]; (7) any public record, statutorily

[8]The Appellants suggest that the use of "and" in section 610.023.2 could have been used by the General Assembly in the disjunctive sense, but then assert that "[b]ecause the facts of this case show that AFSCME is the only private entity that is able to access *and* disseminate the Unredacted Excel [Files]," we need not resolve the issue

defined in section 610.010(6) as "any record, whether written or electronically stored, retained by or of any public governmental body."

There is no dispute that the Office of Administration is a public governmental body,[9] that AFSCME is an entity, that the Unredacted Excel Files are public records, and that the Unredacted Excel Files were provided to AFSCME pursuant to the terms of a contract. The only dispute is whether the Government granted AFSCME an exclusive right to access and disseminate the Unredacted Excel Files.

The Master Labor Contract provides that AFSCME is the "sole and exclusive bargaining representative" for those employees described in an appendix to the Master Labor Contract, whether those employees choose to pay union dues or not. Article 2, section 4 of the Master Labor Contract provides, in relevant part: "Once each quarter, and in electronic format, the Office of Administration will provide the union with a current list of active bargaining unit employees." The Master Labor Contract required such lists to include sixty-nine information fields detailing each employee's name, employment status, salary information, work address, home address, and mailing address, among other information. While AFSCME is the exclusive bargaining representative for the employees described in the Master Labor Contract, there is no provision in the Master Labor Contract that gives AFSCME the exclusive right to access or disseminate the information required

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in this appeal. Because, as discussed *infra*, the Office of Administration neither granted AFSCME an exclusive right to access nor granted AFSCME an exclusive right to disseminate the Unredacted Excel Files, we need not reach whether the General Assembly intended to use "and" in the conjunctive sense or the disjunctive sense.

[9]The Office of Administration was created by statute. *See* section 37.005 ("[T]he office of administration shall be continued as set forth in house bill 384, seventy-sixth general assembly and shall be considered as a department within the meaning used in Omnibus State Reorganization Act of 1974.").

to be included in the quarterly list of active bargaining unit employees provided by the Government. The trial court correctly concluded that the Government's entry into and performance of the Master Labor Contract does not violate the plain language of section 610.023.2.

Point Two is denied.

To overcome rejection of the narrow argument that the Government violated section 610.023.2, the Appellants broadly argue, without citation to any authority, that based on the public policy underlying the Sunshine Law, once the Government elected to "open" public records that could have been closed pursuant to section 610.021(13), the Government forever waived the right to close those public records.

While the Sunshine Law explicitly states that the public policy of the state is for records to be open for public inspection, the Sunshine Law authorizes public governmental bodies to choose to close some records to the public, including those individually identifiable personnel records contained within the Unredacted Excel Files. *See* section 610.011; section 610.021(13). The General Assembly authorized public governmental bodies to choose to close individually identifiable personnel records, performance ratings, and records--excepting those employees' names, positions, salaries, and length of service--presumably in order to afford employees of public governmental bodies a modicum of privacy. *Cf. State ex rel. Delmar Gardens N. Operating, LLC v. Gaertner*, 239 S.W.3d 608, 611 (Mo. banc 2007) (acknowledging that "Missouri recognizes a right of privacy in personnel records that should not be lightly disregarded or dismissed" when discussing the discoverability of personnel records of an employee who witnessed conduct underlying the

employer's petition for a permanent injunction). "It is the role of the legislature, and not the courts, to strike the delicate balance between [open records and employee privacy]," and "[t]he legislature conveys this balance and their intent . . . through the express words and implied meaning of the statute." *Scroggins v. Mo. Dep't of Soc. Servs.*, 227 S.W.3d 498, 503 (Mo. App. W.D. 2007) (quoting *State ex rel. Goodman v. St. Louis Bd. of Police Comm'rs*, 181 S.W.3d 156, 159 (Mo. App. E.D. 2005)).

The Sunshine Law includes no provision permitting the conclusion that sensitive personnel information, if not closed for one purpose, becomes open for all purposes. In a somewhat analogous situation, we have concluded that a public entity's right to close personnel records pursuant to section 610.021(13) does not extend to affect the power of a subpoena issued by a grand jury. *State ex rel. Jackson Cnty. Grand Jury v. Shinn*, 835 S.W.2d 347, 348 (Mo. App. W.D. 1992). Though *State ex rel. Jackson County Grand Jury* did not address whether a grand jury's right to access personnel records renders those records forever open for all purposes under the Sunshine Law, the decision nonetheless recognized that personnel records can be closed for some purposes while open for others.

The trial court concluded that the plain language of the Sunshine Law does not permit the broad conclusion that the statutory authority afforded a public entity to choose to close a public record is forever waived if the public entity has not treated the public record as closed in some other context or under some other circumstance. This was not legal error, particularly in light of the fact that the Government produced the Unredacted

Excel Files to AFSCME in order to comply with the Master Labor Contract to which the Office of Administration was a party pursuant to Missouri's public sector labor law.[10]

Point One is denied.

Conclusion

The Judgment is affirmed.

Cynthia L. Martin, Judge

All concur

[10]Section 105.500 *et seq.*