IN THE CIRCUIT COURT OF PHELPS COUNTY
TWENTY-FIFTH JUDICIAL CIRCUIT
STATE OF MISSOURI

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SONJA CHILDERS
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REBECCA VARNEY, Plaintiff, v. CITY OF EDGAR SPRINGS, ET AL. Defendants.	Case No. 20PH-CV01430 Division I

JUDGMENT

This cause comes before the Court on the Plaintiff's motion for partial summary judgment. The Plaintiff currently has nine separate counts pending in this action; she is seeking summary judgment as to Count I (denial of procedural due process); Count IV (denial of right to personally inspect public records); and Counts VIII and IX (failure to properly respond to public records requests). Being fully advised, the Court now grants the Plaintiff's motion as to each of these counts for the following reasons.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to the material facts, and the facts demonstrate that the movant has a legal right to judgment. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. 1993); Rule 74.04(c)(3). The party moving for summary judgment must support their motion with a statement of uncontroverted material

facts that "state[s] with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue, with specific references to the pleadings, discovery, exhibits, or affidavits that demonstrate the lack of a genuine issue as to such facts." *Green v. Fotoohighiam*, 606 S.W.3d 113, 117 (Mo. banc 2020). The facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion. *Id.* at 115-16. (quoting *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 452-53 (Mo. banc 2011)). In order to demonstrate "a genuine factual issue for trial," "the non-movant must support denials with specific references to discovery, exhibits, or affidavits." *Fotoohighiam* at 116.

Varney complied with Rule 74.04(c)(1) by supporting her statements of uncontroverted material facts with reference to the pleadings, discovery, exhibits, and affidavits. Although the Defendants initially challenged the adequacy of the affidavits and exhibits, Varney remedied the deficiencies with additional filings. Thus, in order to contradict any of the statements of material fact that Varney presented in support of her motion for partial summary judgment, Rule 74.04(c)(2) required the Defendants to support their denials "with specific reference to the discovery, exhibits or affidavits that demonstrate specific facts showing there is a genuine issue for trial." The City submitted an affidavit in connection with its sur-reply, but it did not cite that affidavit in support of any denials of the facts Varney had asserted, nor did it submit a statement of facts as is required by Rule 74.04(c)(2) if a non-movant wishes to contradict the facts asserted by a moving party and/or to

establish its own set of facts. In light of the Defendants' failure to comply with Rule 74.04(c)(2), this Court must treat all of the facts Varney has asserted in connection with her motion for partial summary judgment as admitted.

FACTS

Defendant City of Edgar Springs, Missouri is a municipality and political subdivision of the State of Missouri. Defendant Joseph Hohner is the City's Chief of Police. Plaintiff Rebecca Varney is a citizen of the United States, a resident of the City a taxpayer of the State of Missouri. Varney is a government watchdog who works to ensure that the City is abiding by statutory and constitutional guidelines. In this watchdog role she reviews public records, attends public meetings, and on occasion also publicly criticizes City officials for what she perceives as violations of the law and other forms of mismanagement. For some time prior to April 12, 2018, Varney made a point of exercising the right she enjoys under Missouri statutes to go to the Edgar Springs City Hall for the purpose of reviewing public records during normal business hours and attending open public meetings of the City Council[1] on the evenings they were being held. On December 4, 2019, Rachel Lucas (at that time acting as the City Administrator) confirmed that "[a]ll records are kept at City Hall, we have no records that are kept off site."

[1] Although the City's legislative body appears officially to be styled as a "Board of Aldermen," it appears that the Defendants sometimes refer to it as a "City Council." To remain consistent with the terms used in the No Trespass Notices the City issued to Varney, the Court will refer to this body as "the City Council."

On April 12, 2018, one of the City's police officers delivered to Varney a "No Trespass Notice" ("the First Notice"), which prohibited Varney from entering City Hall for any purpose other than to attend the monthly City Council meetings. The First Notice stated that Varney must submit requests for public records "any other official documentation request... via certified mail, city attorney, or at monthly counsel [sic] meeting." The First Notice prohibited Varney from going to City Hall during normal business hours and asking to review the City's open public records at that location. The City did not afford Varney a hearing regarding the First Notice, either before or after it was issued. The First Notice did not identify any reason that the City was banning Varney from City Hall, nor did she have a formal opportunity to dispute any allegations upon which the City might have based its decision to ban her from City Hall. The City did not provide Varney any way to appeal its decision, represented by the First Notice, to ban her from City Hall.

At a later City Council meeting Varney asked the City Council to withdraw the First Notice. As the City Council was taking a vote as to whether the First Notice would be withdrawn, Kody Lucas, who was at that time the City's Chief of Police, stated that he had the sole authority to decide whether Varney would be permitted to enter City Hall. Lucas stated that he would not withdraw the First Notice.

On November 11, 2019, Defendant Hohner delivered to Varney a "No Trespass Notice" ("the Second Notice"), which stated that she was henceforth prohibited from entering or remaining at City Hall. The Second Notice omitted the permission to attend City Council meetings that was expressly included in the First Notice. The

City did not afford Varney a hearing regarding the Second Notice, either before or after it was issued. The Second Notice did not identify any reason that the City was banning Varney from City Hall, nor did she have a formal opportunity to dispute any allegations upon which the City might have based its decision to ban her from City Hall. The City did not provide Varney any way to appeal its decision, represented by the Second Notice, to ban her from City Hall.

On November 25, 2019, the Edgar Springs City Council held an open public meeting at City Hall. Varney wished to attend the November 25, 2019 open public meeting but the Second Notice prohibited her from doing so. At Varney's request, attorney David Roland spoke with Defendant Hohner prior to the meeting to determine whether Varney would be permitted to attend the meeting. Varney was standing nearby as Roland spoke with Hohner. Hohner stated that Varney would not be permitted to attend the meeting. Because Hohner said she would be treated as a trespasser if she entered City Hall, Varney chose not to try to enter the building that evening.

That same evening Attorney Roland sent the City's City Attorney, Brandi Baird, a letter ("the Warning Letter") notifying the City that its attempt to ban Varney from entering City Hall and attending open public meetings violated the First and Fourteenth Amendments; Article I, §§ 2, 8, 9, and 10 of the Missouri Constitution; § 109.180, RSMo.; and various aspects of Missouri's Sunshine Law, Chapter 610, RSMo. On November 27, 2019, Mayor Gallion sent Varney a letter rescinding the ban

on Varney's attending public meetings held at City Hall, but the letter reiterated that Varney would not be allowed into City Hall during normal business hours.

Varney filed this lawsuit on November 9, 2020. As of the date Varney filed this lawsuit, the City still refused to allow Varney to enter City Hall during regular business hours when all other citizens are permitted to enter City Hall. Varney continued to wish to review the City's public records in person at City Hall, but the City did not allow her to enter City Hall for the purpose of requesting public records until July 11, 2022, when the City lifted its ban against her coming onto City property.

In November 2020 the State Auditor's Office issued Report No. 2020-087 ("the Auditor's Report"), which detailed the results of its audit of the City. Section 5 of the Auditor's Report assessed the City's ordinances and its compliance with the Sunshine Law. Among other problems the Auditor's Report identified, section 5.3 specified that City officials were not maintaining adequate documentation of requests for records and also that the City had not responded to any records requests over a stretch of nearly four months. The Auditor's Report specifically noted § 610.023, RSMo., and explained that the statute requires the City to act on public records requests as soon as possible, but in no event later than the third business day following the date the request was received. The Auditor's Office recommended that the City should take measures to ensure that requests for information are responded to in a timely fashion. The Auditor's Report indicated the City had stated that "Requests for information are now taken care of in a timely manner in compliance with state law."

The Second Notice expressly provided that Varney can submit record requests via email. The City informed Varney that the email address she should use to submit records requests was edgarspringsrecords@gmail.com. On June 13, 2021, more than seven months after filing this lawsuit, Varney sent an email to edgarspringsrecords@gmail.com. The subject line of Varney's email was "Sunshine Request – Council Packets Apr and May 2021". In the text of the email Varney requested copies of documents related to the City Council meetings for April and May 2021. That same day Varney received a response email from edgarspringsrecords@gmail.com stating in part, "Your e-mail has been received and will be reviewed." The signature block at the bottom of this response stated "Melissa Klott, Custodian of Records." The signature block at the bottom of this response also included "9am-1pm," indicating hours that Klott typically worked as of that date. As of June 13, 2021, Klott was acting as the City's Custodian of Records.

Neither the City nor its Custodian of Records immediately produced to Varney any documents responsive to her June 13, 2021 request. Neither the City nor its Custodian of Records gave a detailed explanation of the cause for its delay in producing the records responsive to Varney's June 13, 2021 request. Neither the City nor its Custodian of Records identified the place and earliest time and date that the City would make the records responsive to Varney's June 13, 2021 request available for inspection. Neither the City nor its Custodian of Records stated that access to the records Varney requested on June 13, 2021, would be denied, nor did the City or the

Custodian of Records state any grounds upon which the City might justify denying Varney's June 13, 2021 request.

Not having received any further communication from Melissa Klott or any other City representative regarding her June 13, 2021 records request, on July 7, 2021, Varney filed a motion for leave to file a second amended pleading, highlighting Varney's June 13, 2021 request and the City's failure to either produce the requested records or to explain its reasons for failing to do so. On July 9, 2021—two days after Varney sought to expand this lawsuit to include this new violation of the Sunshine Law—Klott finally sent an email producing the records Varney had requested on June 13, 2021.

In response to a discovery request, the City produced a set of time sheets reflecting hours worked by Klott between June 11, 2021, and October 14, 2021. The City's records show that between June 14, 2021, and July 9, 2021, Klott was credited with working for the City a minimum of three hours per day for each non-holiday weekday. At the time of Varney's June 13, 2021 request the City was aware that it was subject to the Sunshine Law's requirements. At the time of Varney's June 13, 2021 request the City was aware that at least some of the records Varney requested were open public records under the Sunshine Law.

On August 19, 2021, Varney sent another email to edgarspringsrecords@gmail.com. The subject line of Varney's email was "Sunshine Request – Council Packet August 2021". In the text of the email Varney requested copies of documents related to the City Council meeting for August 2021. That same

day Varney received a response email from edgarspringsrecords@gmail.com stating in part, "Your e-mail has been received and will be reviewed." The signature block at the bottom of this response stated "Melissa Klott, Custodian of Records". The signature block at the bottom of this response also included "9am-1pm," indicating hours that Klott typically worked as of that date. As of August 19, 2021, Klott was acting as the City's Custodian of Records.

Neither the City nor its Custodian of Records immediately produced to Varney any documents responsive to her August 19, 2021 request. Varney did not receive any further communication from Melissa Klott or any other City representative regarding her August 19, 2021 request until Varney received an email from Klott on September 7, 2021. The signature block at the bottom of this response also included "8am-1pm," indicating hours that Klott typically worked as of that date. Klott's September 7, 2021 email stated "I will get these out to you no later than Friday." Despite this statement, the City did not produce the records Varney requested in her August 19, 2021 request by that Friday, September 10, 2021.

In light of the City's failure to produce the records responsive to Varney's August 19, 2021 request, she filed her Supplemental Petition on Monday, September 13, 2021. Neither the City nor its Custodian of Records gave a detailed explanation why, three weeks after receiving Varney's August 19, 2021 request, the City still had not produced the records Varney requested. Neither the City nor the Custodian of Records identified the place and earliest time and date that the City would make the records responsive to Varney's August 19, 2021 request available for inspection.

Neither the City nor its Custodian of Records stated that access to the records Varney requested on August 19, 2021 would be denied, nor did the City or the Custodian of Records state any grounds upon which the City might justify denying Varney's August 19, 2021 request.

The City's records show that between August 19, 2021, and September 13, 2021, Klott was credited with working for the City a minimum of three hours per day for each non-holiday weekday. At the time of Varney's August 19, 2021 request the City was aware that it was subject to the Sunshine Law's requirements. At the time of Varney's August 19, 2021 request the City was aware that at least some of the records Varney requested were open public records under the Sunshine Law.

Between September 13, 2021, and July 11, 2022, when the City rescinded its ban on Varney entering City Hall, Varney about once a month submitted an emailed request to edgarspringsrecords@gmail.com asking for open public records, which usually included a request for the packets assembled for each month's City Council meeting. Every time she did so within that timeframe, Varney got a response from that email address in the name of the Custodian of Records stating that her request had been received and would be reviewed. Between September 13, 2021, and May 27, 2022, when she filed her motion for partial summary judgment, the City had not actually produced even one document in response to her several requests in that timeframe, nor had it offered any explanation for the delay or identified the place and earliest time and date that the City would make the records responsive to her requests available for inspection. If the City had allowed Varney to review the City's

public records in person at City Hall, she would have had immediate access to the records she wished to review and would not have been forced to wait weeks (or longer) to receive the records she requested.

I. The City violated Varney's right to procedural due process.

In Count I of her Amended Petition, Varney has asserted that the Defendants violated the Fourteenth Amendment and Article I, § 10 of the Missouri Constitution, which state that government entities may not deprive any person of life, liberty, or property without affording that person "due process of law." Where the government intends to deprive a citizen of a liberty or property interest, procedural due process requires the government to provide the citizen fair notice of an impending action against them as well as an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (2014); *Donaldson v. Mo. State Bd. of Registration for the Healing Arts*, 615 S.W.3d 57, 63 (Mo. banc 2020). "The touchstone of due process is protection of the individual against arbitrary action of government," and a citizen's liberty is protected by the principles of due process even when the liberty itself is a statutory creation of the state. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *see also Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

Varney argues that by banning her from City Hall the Defendants deprived her of two distinct liberty interests: (1) a liberty interest in entering and remaining on public property that is open to the public, and (2) the liberty of personally inspecting public records at the place where they are kept. The Defendants argue that these liberty interests are merely privileges that the City is free to revoke. But the

City misunderstands the nature of a procedural due process claim. In such a claim the question is not whether the government could *ever* revoke a citizen's asserted liberty interest, but rather whether the government has afforded the citizen the notice and hearing safeguards the constitution requires to ensure that the intended revocation is justified.

Here, the record shows that the City never formally presented Varney with an explanation of why it was banning her from City Hall. It did not identify any laws she was alleged to have broken, nor did the City otherwise present a set of facts upon which it had based its decision to impose the ban.[2] The City also never afforded Varney either a hearing at which she could dispute any such allegations or any means through which she might appeal the ban. The Defendants made no effort to show that they provided Varney either notice of the factual or legal basis upon which they intended to deprive her of the liberty interests she has asserted or an opportunity to dispute the validity of any such factual or legal basis. Consequently, Varney must prevail in her procedural due process claim if either of the liberty interests Varney has asserted rise to the level of constitutional protection.

As noted above, the U.S. Supreme Court has made clear that a state's own statutes may give rise to a liberty interest of which the government may not deny a

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[2] The City implied that prior to the ban Varney *might* have engaged in some sort of "disruptive behavior" while visiting City Hall, but never made any specific allegations and, in any event, it failed to present this Court with any statements of fact, discovery, affidavits, or exhibits that Rule 74.04(c)(2) requires in order for this Court to consider such allegations as part of this motion. "Facts come into a summary judgment record *only* via Rule 74.04(c)'s numbered-paragraphs-and-responses framework." *Fotoohighiam* at 117 (emphasis in original).

citizen without first affording the protections required by due process. Missouri law has long guaranteed citizens the liberty of personally inspecting public records; as early as 1885 Missouri courts acknowledged a general common law rule that "records required to be kept in the office of a public officer are public records and open to inspection under the supervision of that officer." *State ex rel. Thomas v. Hoblitzelle*, 85 Mo. 620, 621 (Mo. 1885); see also *State ex rel. Kavanaugh v. Henderson*, 169 S.W.2d 389, 392 (Mo. 1943) ("In all instances where, by law or regulation, a document is required to be filed in a public office, it is a public record and the public has a right to inspect it."). Missourians have enshrined this right in the state's statutes. See §§ 109.180-.190, RSMo.; §§ 610.010-.027, RSMo. Thus, before the Defendants could deny Varney the liberty of inspecting the City's public records in person at City Hall, the principles of due process guaranteed by the Fourteenth Amendment and Article I, section 10 of the Missouri Constitution required them to notify her of the Defendants' factual and legal basis for doing so and they also had to provide Varney the opportunity to dispute that factual and legal basis at a meaningful time and in a meaningful manner. Because the Defendants did not do so, Varney is entitled to summary judgment as to Count I of her Amended Petition.

Additionally, the Defendants violated Varney's liberty interest in entering public property at the same times and on the same terms as any other citizen. Federal courts have long held that a citizen has a constitutionally-protected liberty interest in entering and remaining on public property that is open to the public. *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1266-67 (11th Cir. 2011); *Kennedy v. City of*

Cincinnati, 595 F.3d 327, 335-36 (6th Cir. 2010); *see also City of Chicago v. Morales*, 527 U.S. 41 (1999); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965); *Williams v. Fears*, 179 U.S. 270 (1900). In response to Varney's assertion of this liberty interest, the Defendants cited cases for the proposition that the government is permitted to arrest persons for trespass or otherwise restrict their access to public property if they have been disruptive and refused to leave public property when asked to do so. None of those cases call into question the general liberty interest in entering public property at the same times and on the same terms as all other citizens, but rather depend on the fact that the penalized citizen engaged in specific behaviors that justified their exclusion from certain public property. These cases are inapposite because the record shows that the Defendants never accused Varney of violating any City ordinance or of engaging in any specific disruptive behavior, nor did the Defendants give her any meaningful opportunity to dispute such accusations. In light of the Defendants' complete failure to identify a specific factual or legal basis for banning Varney from City Hall or to give Varney any meaningful opportunity to dispute such a basis, Varney is entitled to summary judgment as to Count I of her Amended Petition.

II. The City violated the Sunshine Law by denying her the ability to personally inspect public records.

Public access to public records is not a new or novel policy for this State. Missouri's public policy in favor of open records and the right of public access is both "well-established" and "mandated legislatively in numerous contexts." *Transit Casualty Co. ex rel. Pulitzer Publishing Co. v. Transit Casualty Co. ex rel. Intervening*

Employees, 43 S.W.3d 293 (Mo. banc 2001). Even before the legislature adopted the Sunshine Law, it had clearly and firmly established citizens' rights to personally inspect public records:

> Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall ***at all reasonable times*** be open for ***personal inspection*** by ***any citizen of Missouri***, and ***those in charge of the records shall not refuse the privilege to any citizen***. Any official who violates the provisions of this section shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred dollars, or by confinement in the county jail not exceeding ninety days, or by both the fine and confinement. § 109.180, RSMo. (emphasis added)

Missouri law prior to the Sunshine Law also spelled out in detail how a citizen was to exercise this right to personally inspect public records:

> In all cases where the public... has a right to inspect or take extracts or make copies from any public records, instruments, or documents, ***any person has the right of access to the records, documents or instruments for the purpose of making photographs of them while in the possession, custody and control of the lawful custodian thereof or his authorized deputy***. The work shall be done under the supervision of the lawful custodian of the records who may adopt and enforce reasonable rules governing the work. The work shall, where possible, be done in the room where the records, documents or instruments are by law kept, but if that is impossible or impracticable, the work shall be done in another room or place as nearly adjacent to the place of custody as possible to be determined by the custodian of the records. While the work authorized herein is in progress, the lawful custodian of the records may charge the person desiring to make the photographs a reasonable rate for his services or for the services of a deputy to supervise the work and for the use of the room or place where the work is done. § 109.190, RSMo. (emphasis added)

Sections 109.180 and 109.190, RSMo., are still in effect and binding on the City. The Sunshine Law augmented these provisions, forging a more explicit and comprehensive legislative commitment to advancing the policy of government

transparency. The Sunshine Law begins by establishing "the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies [are to] be open to the public unless otherwise provided by law," and noting the legislature's demand that the Sunshine Law's requirements "shall be liberally construed and their exceptions strictly construed to promote this public policy." § 610.011.1, RSMo.; *Gross v. Parson*, 624 S.W.3d 877, 886 (Mo. banc 2021). Several sections of the law emphasize the crucial importance of keeping public records open to the public. *See* § 610.011.2, RSMo. ("Except as otherwise provided by law... public records of public governmental bodies shall be open to the public for inspection and copying"); § 610.015, RSMo. ("All... public records shall be open to the public for inspection and duplication."); § 610.022.5, RSMo. (""Public records shall be presumed to be open unless otherwise exempt pursuant to the provisions of this chapter."); § 610.023, RSMo. ("Each public governmental body shall make available for inspection and copying by the public of that body's public records."). Where a public governmental body has denied a requestor access to public information, "the burden of persuasion shall be on the body and its members to demonstrate compliance with the requirements of sections 610.010 to 610.026." § 610.027.2, RSMo.

Here, the Defendants argued that the Sunshine Law allows restrictions on citizen access to public records "as otherwise provided by law." § 610.011(2), RSMo. Missouri courts have long held that where the Sunshine Law allows exceptions "as otherwise provided by law," the phrase means "as otherwise provided by statute." *Pulitzer Pub. Co. v. Mo. State Employees' Retirement Sys.*, 927 S.W.2d 477, 481 (Mo.

App. W.D. 1996). The Defendants did not identify any statute, ordinance, or regulation that would allow them to deny Varney the opportunity to personally inspect public records at the public office at which they are held. Consequently, they did not carry their burden of persuading this Court that they complied with the Sunshine Law's requirements. Varney is entitled to summary judgment as to Count IV of her Amended Petition.

III. The City violated the Sunshine Law by failing to properly respond to Varney's requests for public records.

Section 610.023, RSMo., imposes several clear requirements on public governmental bodies. First, a public governmental body must designate a custodian of records, who is to function as "the single recipient for all requests for access to a governmental body's records." § 610.023.1, RSMo.; *Starr v. Jackson County Prosecuting Atty.*, 635 S.W.3d 185, 190 (Mo. App. W.D. 2021). Second, this provision requires each public governmental body to make its public records available for inspection and copying. § 610.023.2, RSMo. Third, the statute obligates public governmental bodies to respond to requests in a specified time and manner; the government must "act upon" each request "as soon as possible, but in no event later than the end of the third business day" after the custodian of records receives the request and if the government does not *immediately* grant access to the records the custodian must "give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection." § 610.023.3, RSMo. If a public governmental body decides to deny access to a public record, the citizen may request a written statement that identifies the specific

provision of law upon which the government based its denial and the government must provide that written statement "no later than the end of the third business day" after the government receives the citizen's request for it. § 610.023.4, RSMo. In sum, this section means that receiving and properly responding to citizens' records requests *is not optional.* A public governmental body that neglects or avoids this responsibility is in direct conflict with § 610.023.4, RSMo.

The uncontroverted facts of this case show that for at least two of Varney's requests the City failed to comply with § 610.023, RSMo. Melissa Klott, the City's Custodian of Records, acknowledged receiving Varney's June 13, 2021 records request on the day Varney sent it. Although the City never suggested that it was incapable of fulfilling the June 13, 2021 records request or that it was otherwise unwilling to do so, the City did not immediately produce the records Varney requested nor did it provide a detailed explanation of the cause for its delay in producing the records. The failure to do these things constitutes a violation of § 610.023.3, RSMo. Similarly, Klott acknowledged receiving Varney's August 19, 2021 records request on the day Varney sent it. The City never suggested that it was incapable of fulfilling the August 19, 2021 records request or that it was otherwise unwilling to do so, but the City again did not immediately produce the records Varney requested nor did it provide a detailed explanation of the cause for its delay in producing the records. The failure to do these things constitutes another violation of § 610.023.3, RSMo.

Rather than argue that it actually complied with § 610.023.3, RSMo., in regard to these requests, the City insisted that Varney was required not only to allege that

she made the requests, but also to provide *copies* of the requests as exhibits. Importantly, however, the City had already admitted the following in its pleadings:

(1) that Varney made the requests;

(2) the content of the subject lines for each of these requests;

(3) the specific documents Varney asked for in each request;

(4) that the City did not immediately produce any of the requested documents;

(5) that the City did not give a detailed explanation of the cause for its delay in producing the requested documents;

(6) that the City did not state any grounds upon which the City might justify denying the requests

(7) that at the time of each request the City was aware that it was subject to the Sunshine Law's requirements; and

(8) that the City was also aware that at least part of some of the records Varney requested were open public records under the Sunshine Law.

Allegations in a petition which are admitted in a defendant's answer constitute a judicial admission that waives or dispenses with the production of evidence and concedes for the purpose of the litigation that a certain proposition is true. *Holdredge v. Mo. Dental Bd.*, 261 S.W.3d 690, 693 (Mo. App. W.D. 2008); *see also Hobbs v. Dir. Of Revenue*, 109 S.W.3d 220, 222 (Mo. App. E.D. 2003) (defendant's admissions in its answer of allegations in a petition "obviate any need for evidence on that issue"). Rule 74.04(c)(1) allows a party moving for summary judgment to support their statements of uncontroverted material fact by making specific references to the pleadings. In

light of the admissions the City made in its responsive pleadings, Varney has established every material fact that is necessary to establish the City's violations of § 610.023.3, RSMo., in regard to her June 13, 2021 records request and her August 19, 2021 records request. She is entitled to summary judgment as to Counts VIII and IX of her supplemental petitions.

IV. The City's violations of the Sunshine Law were knowing and purposeful.

The record also shows that the City's violations of § 610.023, RSMo., were knowing and purposeful. To establish a "knowing" violation of the Sunshine Law, a plaintiff only needs to show that the defendant had actual knowledge that the conduct at issue would violate a provision of the Sunshine Law. *See Strake v. Robinwood West Community Improvement Dist.*, 473 S.W.3d 642, 645 (Mo. banc 2015). To establish a "purposeful" violation of the Sunshine Law, a plaintiff must show that the defendant manifested "a conscious design, intent, or plan to violate the law and [that they did] so with awareness of the probable consequences." *Id.* (finding purposeful violation even where attorney had advised public government body that they need not produce certain requested records). The Missouri Court of Appeals has noted that a public official would commit a purposeful violation of the Sunshine Law if they "forestall[ed] production of public records until the requester sues[.]" *Buckner v. Buckner*, 908 S.W.2d 908, 911 (Mo. App. W.D. 1995).

The uncontroverted facts show not only that the Auditor's Office had pointed out prior Sunshine Law violations to the City and prescribed specific actions the City should take to avoid future violations, but also that the City acknowledged those

instructions and said that it had taken action to comply with the Sunshine Law going forward. In regard to the requests Varney submitted on June 13, 2021, and August 19, 2021, the City admitted that it was aware of its obligation to comply with the Sunshine Law and also that at least some of the records Varney had requested were open public records. Thus, the City had actual knowledge that it was required to respond to these requests in the timeframe and manner prescribed by § 610.023, RSMo. Furthermore, the City had been fully appraised of the penalties for knowing and purposeful violations of the Sunshine Law via the Warning Letter Roland sent to the City's attorney on November 25, 2019. Despite being fully informed as to both its responsibility to properly respond to Varney's records requests and the likely consequences of failing to do so, the City still failed to comply with the Sunshine Law's requirements—even after Varney filed the Supplemental Petition. On this record, the City's stubborn refusal to comply with § 610.023, RSMo., demonstrates a purposeful violation of the Sunshine Law for which this Court must hold it accountable. Because these violations were knowing and purposeful, § 610.027.4, RSMo., requires the Court to award Varney her costs, attorney fees, and an appropriate civil penalty.

In calculating an appropriate civil penalty, § 610.027.4, RSMo., requires the Court to consider "the size of the jurisdiction, the seriousness of the offense, and whether the public governmental body has violated sections 610.010 to 610.026 previously." Edgar Springs is a very small municipality. Although the Court deems these violations of the Sunshine Law to be quite serious in light of the City's admitted awareness that the Sunshine Law applied and that at least some of the records

Varney requested were open public records that the City had to produce to Varney, and although the State Auditor had directly notified the City of its prior violations of the Sunshine Law, Varney has only requested a civil penalty of $100 for each violation. However, the Court, in its discretion considers a $100 penalty per occurrence to be inadequate and, *sua sponte,* and sets the penalty at $300 per occurrence. Therefore, the Court awards Varney a total civil penalty of $600.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. The Defendants violated Varney's right to procedural due process by depriving her of protected liberty interests without providing her notice of the legal and factual basis for doing so and without giving her an opportunity to dispute such a basis at a meaningful time and in a meaningful manner.
2. The Defendants are hereby enjoined from restricting Varney's liberty to go to City Hall at the same times and on the same terms as other citizens unless the City first provides both notice of the legal and factual basis for doing so and an opportunity to dispute such a basis at a meaningful time and in a meaningful manner.
3. The Defendants violated §§ 610.011.2 and 610.023.2, RSMo., by denying Varney's right to personally inspect open public records at the location where they are kept.
4. The Defendants shall allow Varney to inspect the City's open public records in person at the location where those records are held and they shall also allow Varney to take photographs of open public records without requiring her to pay

for the City to make copies of those records.

5. The City knowingly and purposefully violated the Sunshine Law by failing to respond to Varney's June 13, 2021 records request and her August 19, 2021 records request in the manner required by § 610.023.3, RSMo.
6. The City is ordered to pay a $600 civil penalty to Varney.
7. The City is also ordered to pay the costs and attorney fees reasonably incurred in proving these violations of the Fourteenth Amendment and Missouri's Sunshine Law.
8. Within fourteen days from the date of the entry of this Judgment Varney shall submit to the Court all materials related to the amount of costs and attorney fees she believes to have been reasonably accrued in proving these violations of the Fourteenth Amendment and Missouri's Sunshine Law. No later than seven days after Varney submits these materials to the Court, the City shall file any arguments opposing the reasonableness of the requested attorney fees. The Court will consider these written materials and then will amend this Judgment accordingly.

SO ORDERED.

11-15-22
Date

Hon. Judge John Beger