IN THE CIRCUIT COURT OF COLE COUNTY
NINETEENTH JUDICIAL CIRCUIT
STATE OF MISSOURI

DSCC a/k/a DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,

Plaintiff,

v.

MEGAN WERDEHAUSEN, in her official capacity as Custodian for the Office of the Missouri Attorney General,

and

OFFICE OF THE MISSOURI ATTORNEY GENERAL,

Defendants.

Case No. 19AC-CC00119

MEMORANDUM AND JUDGMENT

The Parties come before the Court on (1) Plaintiff DSCC's Motion for Summary Judgment and (2) Defendants Megan Werdehausen and the Office of the Missouri Attorney General's (collectively, the "AGO") Motion for Summary Judgment. The Court heard oral argument on both motions on May 26, 2022. Having heard the Parties' arguments and being duly advised on the law, the Court grants summary judgment on all counts in favor of DSCC and denies Defendants' Motion for Summary Judgment. Defendants are accordingly ordered to pay civil penalties of $12,000, as well as Plaintiff's reasonable attorneys' fees and costs.

SUMMARY JUDGMENT STANDARD

"The purpose of summary judgment ... is to identify cases (1) in which there is no genuine dispute as to the facts and (2) the facts as admitted show a legal right to judgment for the movant." *ITT Com. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993);

Goerlitz v. City of Maryville, 333 S.W.3d 450, 453 (Mo. Banc 2011) (summary judgment proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law).

A party moving for summary judgment is required to attach to its motion a statement of uncontroverted material facts which sets forth, with particularity and in separately numbered paragraphs, each material fact as to which movant claims there is no genuine issue. Mo. Sup. Ct. R. 74.04(c)(1). The party opposing the motion must then admit or deny each of the movant's factual statements and must support each denial with specific references to the record, or the fact is deemed admitted. *See Cent. Tr. & Inv. Co. v. Signalpoint Asset Mgmt., LLC*, 422 S.W.3d 312, 320, 322 (Mo. banc 2014) ("[T]he non-movant must support denials with specific references to discovery, exhibits, or affidavits demonstrating a genuine factual issue for trial. Facts not properly supported … are deemed admitted.") (citation omitted); *Old Republic Nat'l Title Ins. Co. v. Cox*, 453 S.W.3d 780, 786 (Mo. App. 2014) ("failure to deny the allegations and reference a document showing a genuine dispute results in [the] admission of these assignments").

In this matter, the parties agree on the material facts. Their dispute centers instead on the legal import of those facts. In a few instances, the AGO asserts that facts contained in Plaintiff's statement of facts are immaterial or objects to what it contends is Plaintiff's characterization, but the AGO fails to controvert the truth of such statements. As a result, the Court also considers those facts to be true. *See Blackwell Motors, Inc. v. Manheim Servs. Corp.*, 529 S.W.3d 367, 379 (Mo. App. 2017) (finding denial of facts was ineffectual where only basis for denial was non-movant's assertion the facts were irrelevant and immaterial); *Lindsay v. Mazzio's Corp.*, 136 S.W.3d 915, 920 (Mo. App. 2004) (same). In those instances where the AGO properly controverted a factual statement, the Court has adopted the AGO's version of the facts. *See ITT Com. Fin. Corp.*, 854 S.W.2d at 376 ("When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered.").

FINDINGS OF FACT

With those principles in mind, the Court finds the following facts to be uncontroverted:

1. Then-Missouri Attorney General Josh Hawley formed an exploratory committee for his U.S. Senate run in September 2017 and subsequently announced his candidacy in October 2017. Defs.' Resp. to Pl.'s Statement of Uncontroverted Material Facts ("Defs.' Resp. to Pl.'s SOF") ¶ 5.

2. DSCC supported the incumbent U.S. Senator, Democrat Claire McCaskill, who Mr. Hawley was running against. *Id.* ¶ 1.

3. Daniel Hartman was the AGO's custodian of records in September 2017 and March 2018. *Id.* ¶ 3.

4. Mr. Hartman had a JoshHawley.com email address as early as January 2017 and is now Senator Josh Hawley's state director. *Id.* ¶¶ 4, 6.

5. Mr. Hartman's role as custodian of records gave him significant familiarity with—and understanding of—the requirements of Missouri's Sunshine Law. *Id.* ¶ 9.

6. During his time at the AGO, Mr. Hartman conducted thousands of searches in response to Sunshine Law requests. *Id.*

7. The AGO retains documents in numerous places, including physical or paper files, network drives, case tracking databases, iManage, and other document management systems. *Id.* ¶ 10.

8. AGO policies instruct employees that they can ensure records concerning public business are retained by the AGO by providing them to the custodian of records. *Id.* ¶ 11. AGO policies also prohibit AGO employees from conducting AGO business on private emails. *Id.*

9. On September 12, 2017, DSCC submitted a letter to the AGO seeking production of several categories of public records under the Sunshine Law. *Id.* ¶ 7. Included in this letter was a request for "[c]orrespondence with the firm OnMessage Inc., including any employees or representatives of the organization (January 10, 2017-present)." *Id.*

10. When the AGO received DSCC's September 2017 Sunshine Law Request, Mr. Hartman had correspondence on his personal email account between AGO employees and individuals from OnMessage Inc. concerning public business from April to June 2017. *Id.* ¶ 12.

11. Despite possessing these records and understanding his responsibilities as the AGO's custodian of records, on October 6, 2017, Mr. Hartman responded to DSCC's Sunshine Law request, stating that the AGO retained no documents that were responsive to DSCC's request for "[c]orrespondence with the firm OnMessage Inc., including any employees or representatives of the organization (January 10, 2017-present)." *Id.* ¶ 14.

12. On March 13, 2018, DSCC submitted another request to the AGO for "[a]ll emails, text messages, and other correspondence to or from anyone with a JoshHawley.com email address, an OnMessageInc.com email address, or with Brad Todd, Scott Paradise, Kelli Ford, Kyle Plotkin, or Gail Gitcho (January 10, 2017 - present)." *Id.* ¶ 15.

13. When DSCC submitted its March 13, 2018 Sunshine Law Request, the AGO retained documents on its server that were responsive to DSCC's request. *Id.* ¶ 19. Also, at the time the AGO received DSCC's March 2018 Sunshine Law Request, Mr. Hartman maintained correspondence on his personal email account between AGO employees and individuals with OnMessageInc.com email addresses concerning public business from April-June 2017. *Id.* ¶ 17.

14. On March 14, 2018, Mr. Hartman requested that Eric Branson, an AGO IT professional, conduct a search on AGO servers for documents responsive to DSCC's March 2018 request. *Id.* ¶ 20.

15. On March 16, 2018, Mr. Branson informed Mr. Hartman that his search identified 42 records. The majority of the 42 documents were responsive DSCC's March 2018 Sunshine Law Request. *Id.* ¶ 21.

16. All the records produced to DSCC in this litigation as responsive to DSCC's March 2018 Sunshine Law Request were among the documents contained in the 42 records emailed to Mr. Hartman on March 16, 2018. *Id.*

17. That same day, the AGO responded to DSCC's request, stating: "Due to the dates and the volume of records to be searched, the earliest we expect responsive records, if any, to be available is April 6, 2018." Defs.' Statement of Uncontroverted Material Facts ("Defs.' SOF") ¶ 23.

18. On May 1, 2018, the AGO sent another letter to DSCC, stating: "Due to the scope of our ongoing search for all other potentially responsive records, the earliest we now expect other responsive records to be available is August 1, 2018." *Id.* ¶ 25. Yet the AGO failed, once again, to produce the responsive documents it located in March 2018. *See id.* ¶ 34.

19. The AGO did not send any further correspondence regarding DSCC's discovery request until it finally produced the requested records in response to discovery in this litigation nearly a year and a half after DSCC's March 2018 request. Defs.' Resp. to Pl.'s SOF ¶ 24.

20. In October 2018, the Kansas City Star obtained access to written communications between AGO employees and individuals from OnMessage Inc. *Id.* ¶ 25.

21. These records included correspondence that Mr. Hartman himself received on his personal email account reflecting discussions between AGO employees and individuals with OnMessageInc.com email addresses. *Id.* ¶ 26.

22. On November 2, 2018, the American Democracy Legal Fund filed a complaint with the Missouri Secretary of State regarding then Attorney-General Hawley's use of government funds to support his Senate campaign. *Id.* ¶ 27. The complaint referenced the Kansas City Star's October reporting as part of the basis for its allegations. *Id.*

23. The Secretary of State's Office opened an investigation in response to this complaint and, as part of its investigation, asked the AGO to search its records. *Id.* ¶ 28.

24. On December 21, 2018, the AGO voluntarily produced 85 pages of documents in response to the Missouri Secretary of State's Office's inquiry. *Id.* ¶ 29.

25. This production included documents provided to the AGO's office by individual AGO employees who searched their private email accounts. *Id.* These documents included communications between AGO employees, the Hawley campaign, and political consultants from OnMessage Inc. *Id.*

CONCLUSIONS OF LAW

DSCC contends that the AGO violated the Sunshine Law by (1) failing to turn over documents responsive to the March 2018 Sunshine Law Request until discovery in this litigation, and (2) refusing to produce documents responsive to both the September 2017 and March 2018 Sunshine Law Requests which were stored in Mr. Hartman's private email account. Suggs. in Supp. of Pl.'s Mot. for Summ. J. at 8-13. DSCC contends that both violations were knowing and purposeful. *Id.* at 14-17.

The AGO offers a few responses, all of which the Courts finds unavailing. *First* as to both sets of records, the AGO contends that the production of documents to DSCC—through the course of discovery in this case and through the public dissemination of the records located in Mr. Hartman's private account—moots this litigation. Defs.' Mem. in Supp. of Mot. for Summ. J. ("AGO MSJ") at 15-17. *Second*, as to the March 2018 request, the AGO contends that DSCC's lawsuit was too hasty as the AGO was still searching for documents when DSCC filed suit, and that the documents at issue became exempt from the Sunshine Law under § 610.021(1), RSMo (the "Litigation Exception"), after DSCC filed a separate lawsuit over a different set of documents requested in the same March 2018 letter to the AGO. *Id.* at 13-15. *Third*, as to the documents on Mr. Hartman's private email account, the AGO admits that those records concerned the AGO's "public business" as defined by the Sunshine Law, *see* § 610.010(3), but maintains that possession by Mr. Hartman does not constitute retention by the AGO for the purposes of the Sunshine Law. Defs.' Mem. in Opp'n to Pl.'s Mot. for Summ. J. ("AGO MSJ Opp.") at 3-6. *Fourth*, as to the contention that these violations were knowing and purposeful, the AGO contends that such a ruling cannot be made on summary judgment, and that the uncontroverted facts here do not support a knowing and purposeful violation. *Id.* at 8-11.

Because the AGO's mootness argument applies to all record requests at issue, this Court will first briefly address why the production of the documents does not moot this litigation. It will then consider each set of documents, focusing first on why the AGO violated the Sunshine Law then explaining why the summary judgment record demonstrates that these violations were knowing and purposeful.

I. The production of the documents at issue here does not moot this litigation.

As an initial matter, the production of the documents in question does not moot this case. A case is only "moot if a judgment rendered has no practical effect upon an existent controversy." *TCF, LLC v. City of St. Louis*, 402 S.W.3d 176, 181 (Mo. App. E.D. 2013). Here, while DSCC has received the documents it claims were wrongly withheld, DSCC also requests a declaration that the requested records are open records subject to public inspection under the Sunshine Law (which the AGO denies), a finding that the AGO knowingly and purposefully violated the Sunshine Law, an order directing the AGO to pay DSCC's attorneys' fees and costs, and an order directing the AGO to pay civil penalties. Pet. for Declaratory & Injunctive Relief at 14. Because all of this relief remains available, the production of the records at issue here does not render this case moot.

II. The AGO violated the Sunshine Law by failing to turn over documents responsive to DSCC's March 2018 Sunshine Law Request which it located on its servers.

Turning to the more recent of the requests at issue here, the Court finds that no material facts are in dispute. The parties agree that when DSCC submitted its March 2018 Sunshine Law Request in March 2018, the AGO retained documents on its server responsive to DSCC's request. Finding of Fact ("FOF") ¶ 13. The question here is a legal one: did the AGO violate the Sunshine Law by failing to produce responsive records to DSCC between March 16, 2018—when it admittedly located all of the responsive records it subsequently turned over in discovery in this lawsuit—and August 2019, when it first turned those records over to DSCC in discovery? This Court holds that it did.

A. The AGO violated the Sunshine Law both by failing to provide DSCC a detailed explanation for its delay in turning over responsive records, and by withholding responsive records it had located for nearly a year and a half.

The AGO's conduct in response to DSCC's March 2018 request violated the Sunshine Law in at least two ways. First, the Sunshine Law states that a request for public records must be acted upon with three business days, and that if access to the records is not granted immediately, "the custodian shall 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. Here, while the AGO responded to DSCC's request within three business days, it never provided DSCC with a detailed explanation of the cause for further delay and the place and earliest time and date that the record would be available for inspection. Specifically, the AGO's letters to DSCC concerning this request referenced "the volume of records" on March 16, 2018 as the reason for delay, FOF ¶ 17, and the "scope" of the ongoing search as the reason for further delay on May 1, 2018. FOF ¶ 18. But the AGO did not provide any further explanations after May 1, 2018, and it never provided the records Mr. Branson located until DSCC filed this lawsuit and sought discovery in this matter. FOF ¶ 19.

The Court need not decide whether these cursory explanations constitute "reasonable cause" to exceed the three-day document production period to determine they were inadequate; the AGO *never* provided the responsive documents in response to DSCC's Sunshine Law Request—it only finally produced them in response to discovery in this litigation. FOF ¶ 19. While in some circumstances a government agency may require more than three days to diligently review voluminous records before responding to a request, here the AGO located the responsive documents at issue within three days of receiving the request. FOF ¶¶ 13-16. The Court holds that the AGO violated the Sunshine Law by withholding these documents without any explanation until DSCC filed this lawsuit.

The AGO's conduct amounted to an effective denial of DSCC's Sunshine Law Request. While the Sunshine Law does not provide a deadline for producing responsive records once reasonable cause for exceeding the three-day period is established, a substantial delay effectively

becomes a failure to produce responsive records as required by the law. For example, a party that locates responsive records in its possession, but declines to turn them over for ten years, surely violates the requirements of the Sunshine Law. A delay of mere weeks, on the other hand, may not constitute an effective denial. The AGO's indefinite delay here—which terminated only by compulsion of the discovery process—crossed that line. This conclusion is also buttressed by the fact that the AGO provided no further communication to DSCC concerning this Sunshine Law Request after May 1, 2018; had DSCC not filed suit, the AGO would not have produced the responsive records. FOF ¶¶ 18-19. The AGO's wrongful denial of DSCC's request violated the Sunshine Law.

B. None of the AGO's arguments justifies its violation of the Sunshine Law.

The AGO offers two excuses for its failure to turn over the responsive documents located on its servers, but neither is legally sufficient. First the AGO contends that when this lawsuit was filed, it was still searching for responsive documents and had not completed its production. AGO MSJ at 13-15. This argument is belied by two facts. *First*, the AGO never informed DSCC that it was still searching for documents after May 1, 2018, and indeed never raised that contention until briefing for summary judgment in this matter. *See* FOF ¶¶ 17-19. *Second*, the AGO identified all the responsive records it ultimately produced within three days of receiving the request. FOF ¶¶ 13-16. The AGO's failure to produce responsive documents until DSCC initiated this lawsuit violates the Sunshine Law's mandate to make public records of a government body available for public inspection. § 610.023(2), RSMo; *State ex rel. Pulitzer Mo. Newspapers, Inc. v. Seay*, 330 S.W.3d 823, 827 (Mo. Ct. App. 2011) (explaining that the Sunshine Law's central purpose is "for governmental conduct to be open to public inspection").

The AGO also contends that it was entitled to withhold these records under the Litigation Exception, but this argument is also misplaced. The Litigation Exception authorizes a public governmental body to close records "to the extent they relate to . . . [l]egal actions, causes of action or litigation involving a public governmental body and any confidential or privileged communications between a public governmental body or its representatives and its attorneys."

§ 610.021(1), RSMo. The AGO argues that the responsive records became "related to litigation" when DSCC brought a lawsuit in July 2018 challenging the AGO's response to different and unrelated Sunshine Law requests contained in the same March 2018 letter from DSCC. AGO MSJ at 13-15.

Contrary to the AGO's suggestion, the fact that the AGO was involved in a different lawsuit against DSCC concerning a different Sunshine Law request does not sweep all DSCC requests under the Litigation Exemption. This is because the Litigation Exception does not shield documents from production just because they concern potentially controversial subject matter that might someday become the subject of litigation. There must be "a clear nexus between the document sought and the [actual or] anticipated litigation." *Wyrick v. Henry*, 592 S.W.3d 47, 56 (Mo. Ct. App. W.D. 2019) (quoting *Tuft v. City of St. Louis,* 936 S.W.2d 113, 118 (Mo. App. E.D. 1997)). "A 'clear nexus' exists only in those narrow instances where the record by its inherent nature 'relates to' pending or threatened litigation." *Wyrick,* 592 S.W.3d at 57. Further, "[a] record's inherent nature is a constant, divorced from the identity of the person requesting the record, and from whether a public governmental body has been placed on notice of possible litigation." *Id.* at 56. In other words, if records are not already related to litigation by their inherent nature, they cannot suddenly become related to litigation because a lawsuit concerning them arises.

There is no "clear nexus" between the withheld records and DSCC's unrelated July 2018 lawsuit. That case—*DSCC a/k/a Democratic Senatorial Campaign Comm. v. Hartman*, No. 18AC-CC00282 (Cole Cnty. Cir. Ct. July 26, 2018) (the "*Hartman* case")—concerned (1) communications related to the residence of then-Attorney General Hawley, (2) "information related to Hawley's supposed creation of a Public Corruption Team that would investigate abuse occurring in public offices and agencies throughout the state," and (3) "internal communications in the [AGO] related to the Missouri Democratic Party's and DSCC's previous Sunshine Law requests." Pet. ¶¶ 3-5, *DSCC a/k/a Democratic Senatorial Campaign Comm. v. Hartman*, No. 18AC-CC00282 (Cole Cnty. Cir. Ct. July 26, 2018). Of the 44 pages of records at issue in this case, only six involve media requests for comment on lawsuits concerning then-Attorney General

Hawley's residence, and none involve records relating to the *Hartman* case. The Litigation Exemption has no applicability here.

Further, it bears repeating the AGO did not at any point prior to this litigation inform DSCC that it was withholding the records under the Litigation Exception. *See* FOF ¶¶ 17-19. If the AGO was truly relying on the Litigation Exception, its failure to communicate that to DSCC violated its obligation to provide a detailed explanation of why the request was not immediately granted. § 610.023(3), RSMo. But, as explained above, the Litigation Exception does not apply, and the AGO violated the Sunshine Law as a matter of law by failing to produce responsive records in its possession for nearly a year and a half, between the date it located the documents and the date it provided them in response to a discovery request in this litigation.

III. The AGO violated the Sunshine Law by failing to turn over documents responsive to DSCC's September 2017 Sunshine Law Request which were retained by its custodian of records.

Turning to the earlier Sunshine Law request at issue, the Court also finds that no material facts are in dispute—the parties agree that records responsive to that request concerned public business and were stored on the personal email account of the custodian of records when the AGO received this request in September 2017. FOF ¶¶ 9-10. The question before this Court is again purely legal: does retention by the agency's custodian, in his private email account, of records concerning the AGO's public business constitute retention by the AGO? The Court holds that it does.

The Sunshine Law's plain language compels this conclusion. It defines a public record, in pertinent part, as "any record, whether written or electronically stored, retained by or of any public governmental body . . . ." § 610.010(6), RSMo. Here, the word "retain" means "to hold or continue to hold in possession or use[;] continue to have, use, recognize, or accept[;] maintain in one's keeping." *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 881 (Mo. 1999) (quoting *Webster's Third New International Dictionary* 1938 (1976)). So the question becomes, who must "maintain [a record] in" their "keeping" for the AGO to retain that record?

A record need not be *physically* located on the AGO's premises or on the AGO's servers for the AGO to retain it, as confirmed by testimony from both the AGO's current and former custodian of records. *See* FOF ¶ 7. If, for example, the AGO maintains its documents in servers not physically located in its offices or stores some AGO documents offsite, no one could argue that such documents were not retained by the AGO because they were outside the physical confines of the AGO's office space.

But if retention by the AGO is not limited to the physical confines of its office space, what is the relevant test for determining whether records are "retained" by the AGO under the Sunshine Law? Here too the statutory language provides the answer: an agency retains records that are maintained by its custodian. The Sunshine Law requires that "[e]ach public governmental body is to appoint a custodian who is to be responsible for the maintenance of that body's records," and this duty of maintenance entails the "care and keeping" of the agency's records. *State ex rel. Daly v. Info. Tech. Servs. Agency of St. Louis*, 417 S.W.3d 804, 808 (Mo. Ct. App. 2013). In other words, retention for purposes of the Sunshine Law asks whether an organization has "maintain[ed a record] in [its] kee[ping]," and the Sunshine Law provides that an organization's custodian of records is the individual responsible for keeping the organization's records. "That responsibility of care and keeping includes the proper dissemination of those records." *Id.* at 809; *see also Pennington v. Dobbs*, 235 S.W.3d 77 (Mo. Ct. App. S.D. 2007) (distinguishing between documents in the control of an employee generally, and those in the possession of the custodian of records, because whether an agency retained records centered on the custodian's legal control of those records).

The Sunshine Law and the AGO's own policies confirm this interpretation. For one, the Sunshine Law routinely equates possession by the custodian of records with retention by an agency. Section 610.023, for instance, explains that a custodian of records is "to be responsible for the maintenance of" a government body's records, and that "[n]o person shall remove original public records from the office of a public governmental body or its custodian without written permission of the designated custodian." And Section 610.025 instructs government employees

that they can ensure certain records of public business are appropriately retained by either transmitting the message to their public office computer *or to the custodian of records*. Further, the AGO's own policies direct employees to ensure records concerning public business are retained by providing them to the custodian of records. FOF ¶ 8.

Taken together, these sources make clear that retention by an agency and possession by its custodian of records are one and the same for the purposes of the Sunshine Law. This is true regardless of the custodian's method of storage—whether on AGO servers, in the custodian's file cabinet, or, in this case, in his personal email account—because the custodian's duties include the proper dissemination of the AGO's records. And although this Court has ruled that the choice to not retain certain records falls under Chapter 109 and is outside the purview of this litigation, that is not the question here; these are not records which, for example, were quickly deleted and no longer in the AGO's possession. *Cf. Sansome v. Governor of Mo.*, No. WD8846, slip. op. at 13-15 (Mo. Ct. App. W.D. June 7, 2022). The pertinent question here is whether documents *concerning "public business"* that the custodian of records has kept in his possession (wherever the custodian has chosen to keep them) are retained by the AGO. This Court concludes that they are.

Finally, it is worth emphasizing the limited scope of the Court's decision today. This ruling will not lead to the parade of horribles envisaged by the AGO. *See* AGO MSJ Opp. at 1. It does not require an agency to search every employee's personal email when receiving a Sunshine Law request to avoid potential liability. *Id.* Rather, this Court holds that a custodian of records must do his job; the Sunshine Law and settled precedent define this job to include the care and keeping of an agency's records, and settled precedent further establishes that an agency violates the Sunshine Law when its custodian maintains responsive records concerning the agency's public business but fails to provide them in response to a Sunshine Law request.

The approach urged by the AGO, on the other hand, is unprecedented and creates a roadmap for abuse. It would allow an agency and its custodian to shield public records merely by storing them offsite. By simply choosing to conduct public business over private email, or to work on private computers and devices, agencies could deny citizens the open government that the

General Assembly sought to ensure and render the Sunshine Law toothless. It is the public policy of this state "that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law." § 610.011, RSMo. Surely agencies should not be able to evade its strictures so easily.

For these reasons, this Court holds that the AGO also violated the Sunshine Law by failing to turn over records in the possession of its custodian of records in response to DSCC's Sunshine Law Requests.

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

As an initial matter, this Court rejects the AGO's assertion that it is inappropriate to determine that a violation of the Sunshine Law was knowing or purposeful at the summary judgment stage. "What constitutes a knowing or purposeful violation of the Sunshine Law is a question of law." *ACLU of Mo. Found. v. Mo. Dep't of Corr.*, 504 S.W.3d 150, 153 (Mo. Ct. App. W.D. 2016). Other judges on this Circuit Court have granted summary judgment on these issues and awarded statutory damages and attorneys' fees in previous Sunshine Law cases. *See, e.g.*, *Ganz v. Dep't of Health & Senior Servs.*, No. 16AC-CC00503 at *35-46 (Cole Cnty. Cir. Ct. Apr. 15, 2020) (granting plaintiff's motion for summary judgment and finding that defendant knowingly and purposefully violated the Sunshine Law as a matter of law). In fact, "the Court of Appeals *regularly* affirms findings of a knowing violation [of the Sunshine Law] when the evidence showed the government withheld documents it knew were not exempt under the Sunshine Law." *Id.* at *36 (emphasis added). As with any other question of fact, a court may properly find that a Sunshine Law violation was knowing and purposeful at the summary judgment stage when the movant establishes a lack of any genuine dispute of material fact. *See Mo. Nat'l Educ. Ass'n v. Mo. Dep't of Lab. & Indus. Rels.*, 623 S.W.3d 585, 590 (Mo. banc 2021). Here, the Court makes such a finding.

A knowing violation of the Sunshine Law occurs when "the public governmental body had actual knowledge that the Sunshine Law required production but did not produce the document."

Laud v. City of Arnold, 491 S.W.3d 191, 200 (Mo. banc 2016). "A purposeful violation of the Sunshine Law occurs when there is 'a conscious design, intent, or plan' to violate the law and do so 'with awareness of the probable consequences.'" *Strake v. Robinwood W. Cmty. Improvement Dist.*, 473 S.W.3d 642, 645 (Mo. 2015) (quoting *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. banc 1998)). There is no genuine dispute that the AGO knew the Sunshine Law required it to produce responsive documents in its possession when it received DSCC's two Sunshine Law requests, but made the conscious decision not to do so.

The Court's conclusion that the AGO's violations were knowing and purposeful is supported by the context surrounding these requests, by the AGO's conduct in response to the requests, and by the shifting rationales the AGO has offered to explain its failure to turn over responsive documents. To begin, the content of the requests and the respective motivations of both the AGO and DSCC provide essential context. Then-Attorney General Hawley was actively running for U.S. Senate at the time of these requests, which were submitted by a national party committee supporting his opponent. FOF ¶¶ 1-2. The requested documents showed—at a minimum—a questionable use of government resources, demonstrated by the fact that their eventual public release helped trigger an investigation by the Secretary of State's Office into the potential misuse of government funds to support Attorney General Hawley's Senate campaign. FOF ¶¶ 20-25. By failing to produce the requested records, Mr. Hartman and the AGO prevented an opposing party committee from accessing documents potentially damaging to then-Attorney General Hawley's political campaign. What is more, Mr. Hartman—the individual at the center of the AGO's failure to turn over these records—is included on much of the correspondence in question, was involved with the Hawley campaign as early as January 2017, and ultimately became Senator Hawley's state director. FOF ¶¶ 4, 10,13. This context compels the conclusion that the decision to withhold documents responsive to DSCC's Sunshine Law requests was made by public officials who had personal and professional stakes in the documents not being released and in the success of then-candidate Hawley's campaign.

In addition to this context, the AGO's conduct regarding these Sunshine Law requests supports this Court's finding that the violations here were knowing and purposeful. It is undisputed that the AGO retained records responsive to DSCC's March 2018 request, located these documents within three days of receiving the request, and failed to produce these documents until nearly a year and a half later, during discovery in this litigation. FOF ¶¶ 12-19. The AGO's failure to provide any coherent explanation for its substantial delay after failing to meet its second self-imposed, protracted deadline—much less the "detailed explanation" required by the Sunshine Law, § 610.023(3), RSMo—indicates that it was not actively seeking to comply with the law. Rather, after identifying responsive documents, the AGO evaded the law's requirements, deliberately concealing responsive documents. The AGO did not need more time to respond to DSCC's request: it located all responsive documents on March 16, 2018, FOF ¶¶ 15-16, and it deliberately withheld these documents without any plausible, lawful rationale for doing so.

The AGO's conduct regarding DSCC's September 2017 request similarly demonstrates a knowing and purposeful Sunshine Law violation. At all times relevant to this case, Mr. Hartman retained the responsive communications in his personal email. FOF ¶¶ 10, 13. As the AGO's custodian of records, Mr. Hartman conducted thousands of searches in response to Sunshine Law requests and had significant familiarity with—and understanding of—the Sunshine Law. FOF ¶¶ 5-6. He testified that AGO employees could ensure that private correspondence related to public business was properly retained by the AGO by sending it to the custodian of records. *See* FOF ¶ 8. The record is sufficient to establish that Mr. Hartman knew that documents in his personal email may be considered "retained" for purposes of the Sunshine Law. He made the choice to not review and produce these records as required.

Further, the fact that this public business was conducted through and stored on private email accounts—in direct contravention of the AGO's official policies prohibiting AGO employees from conducting public business on private emails, FOF ¶ 8—is itself evidence of "a conscious design, intent, or plan" to conceal these potentially controversial records from public view. *Strake*, 473 S.W.3d at 645 (quoting *Spradlin*, 982 S.W.2d at 262) (defining purposeful

Sunshine Law violation). Every AGO employee on the responsive emails, including Mr. Hartman, simultaneously switched to their personal email accounts when discussing official business with Senator Hawley's consultants. And Mr. Hartman's decision to conduct this business on his personal email and then not search that email in response to a Sunshine Law request happened to benefit then-Attorney General Hawley's campaign by keeping potentially controversial documents from the national party committee supporting his opponent. Taken together, these facts compel the conclusion that the AGO's woefully inadequate response to the September 2017 request purposefully violated the Sunshine Law. *See Doe 122 v. Marianist Province of the U.S.*, 620 S.W.3d 73, 76 (Mo. 2021) (noting genuine issue sufficient to overcome summary judgment exists only when two contradictory accounts of the facts are "plausible," and the dispute is "real, not merely argumentative, imaginary, or frivolous").

The AGO's contradictory, shifting, and post-hoc rationales for its failure to produce the documents it located and identified as responsive also support this Court's holding of a knowing and purposeful violation. The AGO contends that this lawsuit is premature because the AGO had not completed its production when the lawsuit was filed, but argues simultaneously that the responsive documents located on its servers were closed all along under the Litigation Exception. *See* AGO MSJ at 13-15. Both explanations cannot be true: if the AGO truly believes that these records were closed due to the Litigation Exception, then it is simply false to suggest that its production is still ongoing, or that DSCC's lawsuit was premature. AGO MSJ Opp. at 1, 7-8. The incompatibility of the AGO's rationales reveals their insincerity.

Additionally, the fact that the AGO did not invoke the Litigation Exception as a basis for withholding the requested records at any point prior to this case indicates that this rationale was manufactured for this lawsuit. *Cf. Ganz*, No. 16AC-CC00503 at *39 (finding a knowing and purposeful violation at summary judgment based in part on the agency's "failure to cite [the claimed exception] until more than six months after it first responded to Plaintiffs' Sunshine Law requests"). The undisputed evidence shows the AGO simply chose not to turn over responsive records.

Finally, the AGO's cursory denials that it did not knowingly and purposefully violate the law do not create a genuine dispute on this issue and are not sufficient to defeat summary judgment. A litigant cannot avoid summary judgment by simply denying the veracity of the movant's facts, but rather must point to specific facts in the record that, if true, would establish a genuine issue for trial. *DeCormier v. Harley-Davidson Motor Co. Grp., Inc.*, 446 S.W.3d 668, 671 (Mo. banc 2014). The AGO has failed to do so here. As such, this Court finds that the AGO knowingly and purposefully violated the Sunshine Law.

V. An award of civil penalties, attorney's fees, and costs are appropriate.

The AGO's knowing and purposeful Sunshine Law violations warrant civil penalties, attorneys' fees, and costs. The Sunshine Law provides that a defendant who "knowingly" violates the law "shall" pay a civil penalty of up to $1,000, and "may" be ordered to pay the plaintiff's attorney's fees and costs. *See* § 610.027(3), RSMo.

Accordingly, the Court assesses a $1,000 penalty against the AGO for its knowing violation of the Sunshine Law in connection with DSCC's September 2017 request, and a separate $1,000 penalty against the AGO for its knowing violation of the Sunshine Law in connection with DSCC's March 2018 request. *See Ganz,* No. 16AC-CC00503 at *44 (assessing separate $1,000 penalties for each knowing Sunshine Law violation).

The law further provides that a defendant who "purposely" violates the Sunshine Law "shall" pay a fine of up to $5,000, and "shall" pay the plaintiff's attorney's fees and costs. *See* § 610.027(4), RSMo. Accordingly, the Court assesses a $5,000 penalty against the AGO for its purposeful violation of the Sunshine Law in connection with DSCC's September 2017 request, and a separate $5,000 penalty against the AGO for its purposeful violation of the Sunshine Law with respect to DSCC's March 2018 request.

The Court acknowledges that this is the maximum penalty that may be imposed for a knowing and purposeful violation of the Sunshine law and finds it to be appropriate given the position of the offending parties (the office of the Attorney General and its custodian of records)

and its role in both educating about and enforcing the Sunshine law. It is further noted that Ms. Werdehausen, the custodian of records at the time of the litigation, has been substituted into the cause only in her official capacity. Nothing in this judgment should be construed as finding Ms. Werdehausen individually violated the Sunshine law.

Lastly, the Court has found that the AGO committed both knowing and purposeful violations of the Sunshine Law and orders the AGO to pay Plaintiff's attorneys fees and costs. The Court will determine the scope of this award following Plaintiff's submission of a Bill of Costs and Fee Request within 60 days of the entry of this Memorandum and Judgment.

* * *

In sum, this Court holds that the AGO retained the records requested by DSCC in the September 2017 and March 2018 Sunshine Law requests but failed to produce them, and did so knowingly and purposefully in violation of the Sunshine Law.

It is therefore:

ORDERED that Plaintiff's Motion for Summary Judgment is GRANTED and Defendants' Motion for Summary Judgment is DENIED;

ORDERED that Defendants are assessed $12,000 in civil penalties for their violations of the Sunshine Law in connection with DSCC's September 2017 and March 2018 Sunshine Law requests;

ORDERED that Defendants pay Plaintiff's reasonable attorneys' fees and costs; and

ORDERED that Plaintiff submit a Bill of Costs and Fee Request within 60 days of the entry of this judgment.

11/14/22

Date

Judge