IN THE MISSOURI SUPREME COURT

No. SC94842

JOHN P. STRAKE

Plaintiff-Appellant

v.

ROBINWOOD WEST COMMUNITY IMPROVEMENT DISTRICT

Defendant-Respondent

On Appeal from the Circuit Court of St. Louis County

SUBSTITE BRIEF OF APPELLANT

Anthony E. Rothert, #44827
Andrew J. McNulty, #67138
American Civil Liberties Union
of Missouri Foundation
454 Whittier Street
St. Louis, Missouri 63108
Phone: 314/652-3114
Fax: 314/652-3112
trothert@aclu-mo.org
amcnulty@aclu-mo.org

Gillian R. Wilcox, #61278
American Civil Liberties Union
of Missouri Foundation
3601 Main Street
Kansas City, Missouri 64111
Phone: 816/470-9938
Fax: 314/652-3112
gwilcox@aclu-mo.org

Attorneys for Plaintiff-Appellant

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Jurisdictional Statement

This is an appeal from the final order and judgment of the Circuit Court of St. Louis County entered on January 21, 2014.

In November 2012, Appellant, John P. Strake, sought disclosure of public records from Respondent, Robinwood West Community Improvement District (RWCID), under the Missouri Sunshine Law. After RWCID refused to disclose the requested public records, Strake filed the underlying lawsuit.

Strake appealed from the trial court's failure to find that RWCID knowingly or purposely violated the Sunshine Law. The Court of Appeals, Eastern District, affirmed. *Strake v. Robinwood W. Cmty. Improvement Dist.*, No. ED 101213, 2015 WL 166917, at *1 (Mo. App. E.D. Jan. 13, 2015).

On April 28, 2015, this Court sustained Strake's application for transfer. This Court has jurisdiction under Article V, section 10 of the Missouri Constitution.

Statement of Facts

Strake is a resident of Robinwood West Community Improvement District (RWCID), which is located in St. Louis County. (LF 22, 25, 59, 113). RWCID is a governmental body created under the laws of Missouri. (LF 22, 36, 59-60, 113). RWCID is a "[p]ublic governmental body" within the definition of section 610.010(4) of the Missouri Sunshine Law.[1] (LF 22, 36, 59-60, 113).

On November 12, 2012, Strake submitted a written Sunshine Law request to RWCID, seeking copies of documents related to a personal injury lawsuit involving RWCID and another RWCID resident: *Michael v. Robinwood West Community Improvement District*, No. 10SL-CC00697 (21st Jud. Cir.) (the *Michael* case). (LF 5-6, 9, 23-24, 25-26, 28, 60-61). Among the public records requested were minutes, votes, legal bills, and the settlement agreement related to the *Michael* case. (LF 5-6, 9, 23, 26, 28, 111). The *Michael* case had been fully and finally disposed of before Strake submitted his Sunshine Law request. (LF 24, 62).

On November 20, 2012, Strake received an email from RWCID's office assistant confirming that RWCID received his "Sunshine request," and informing him that RWCID had contacted its attorney regarding the request for records related to the

[1] All statutory references are to the Missouri Revised Statutes 2000, as updated, unless otherwise noted.

Michael case.[2] (LF 23, 29, 61, 113). In a December 7, 2012 email from RWICD's President, accompanied by a copy of a letter from RWCID's attorney in the *Michael* case, Strake was informed that no records related to the *Michael* case would be produced without a court order. (LF 23, 26, 32-34, 61-62, 64, 86, 113).

The letter from RWCID's attorney never suggested the settlement agreement or other requested documents could be closed under the Sunshine Law. Rather, specifically with regard to the settlement agreement, RWCID's attorney opined that RWCID "may not produce a copy of the Release of All Claims from [the *Michael* case] without exposing [RWCID] to damages for breach of contract."[3] (LF 33). The letter informed RWCID that the settlement agreement "contains a confidentiality clause which states that the terms of the release cannot be disclosed by RWCID or Stephanie Michael unless ordered by law or a Court." (LF 33). The confidentiality clause in the settlement agreement, which was reviewed *in camera* by the trial court and submitted by stipulation as an exhibit on appeal, actually states the following: "The terms of this settlement and release shall remain confidential unless required by law, order of the court or as necessary to complete probate and settlement of the case." (Ex. A; LF 113). The attorney consulted by RWCID also suggested that all requested minutes and votes regarding the

---

[2] Strake had also requested records related to late payment on non-resident pool memberships. Copies of these records were provided.

[3] In this brief, Strake uses the term "settlement agreement" to refer to the "Release of All Claims."

lawsuit are work product and, thus, could not be produced. (LF 33). RWCID's attorney concluded the letter by stating: "While we are cognizant of RSMO 610.021, we believe the most prudent course is to refuse these requests absent a Court Order to produce the requested documents." (LF 34).

RWCID did not initiate a suit to determine the legality of closing the records and vote. *See* § 610.027.6.

Understanding that RWCID would not disclose public records without a court order and that it elected not to initiate a suit to determine whether the records could be closed, Strake filed a petition under to the Sunshine Law challenging RWCID's refusal to produce the open records he requested. (LF 4-7, 23, 26, 62).

On January 21, 2014, the trial court issued its final order and judgment.[4] (LF 111-15). After reviewing the settlement agreement, the court found that it contained a confidentiality clause "stating that the terms of the settlement and any release thereof

[4] The January 21, 2014 order and judgment grants in part and denies in part Strake's motion for summary judgment, thus appearing not to contain all of the necessary elements of a final appealable judgment. (LF 111-15). On April 11, 2014, the court issued a Nunc Pro Tunc Order clarifying that the January 21, 2014 order and judgment was a final determination of the case. (Supp. LF 1-2).

shall remain confidential unless there is an order of the Court."[5] (LF 113). The court then found that the settlement agreement must be disclosed under the Sunshine Law. (LF 113-14). The court found further "that RWCID has two mutually conflicting obligations; it is bound by the terms of its contract to keep its settlement agreement confidential until the Court ordered it released, but it is also subject to the provisions of the Sunshine Law if it did not release the agreement."[6] (LF 113). The court then ordered "the disclosure of the settlement agreement, pursuant to the plain terms of applicable law." (LF 113). In addition, the trial court found that all minutes or votes as well as the amount of all legal bills paid must be disclosed. (LF 114). Regarding RWCID's refusal to disclose the requested documents, the court held that "RWCID was relying on the advice of counsel to avoid a lawsuit for breach of contract." (LF 113).

Citing to *Spradlin v. City of Fulton*, 982 S.W.2d 255 (Mo. banc 1998), the court stated that while ordering disclosure "of the settlement agreement[, the court] declines to award a civil fine or attorneys' fees, as requested by [Strake]." (LF 113-14). The court's

---

[5] The trial court's finding related to the terms of the confidentiality clause was only partially correct because the clause provided that, in addition to a court order, disclosure could also be required by law or to complete probate and settlement. (Ex. A).

[6] *See supra* note 5.

decision not to impose such a penalty or award attorneys' fees constituted a conclusion that RWCID's Sunshine Law violation was neither knowing nor purposeful.[7]

Strake appeals from the trial court's failure to find that RWCID knowingly or purposely violated the Sunshine Law and its decision not to impose a civil penalty against RWCID or award attorneys' fees and costs to Strake.

[7] *Spradlin* addressed an alleged purposeful violation of the Sunshine Law. The case predated the amendment to section 610.027 that added a remedy for knowing violations. *See* SB 869, 92d Gen. Assemb., 2d Reg. Sess. (Mo. 2004). Under the current law, a civil penalty is mandated for both knowing and purposeful violations of the Sunshine Law. §§ 610.027.3-.4.

Point Relied On

I. The trial court erred in failing to find that that RWCID knowingly or purposely violated the Missouri Sunshine Law, declining to impose a civil penalty against RWCID, and denying Strake's Request for attorneys' fees and costs because the undisputed facts demonstrate, by a preponderance of the evidence, that RWCID knowingly or purposely violated the Sunshine Law when it failed to disclose the requested records in that the facts do not support a finding that RWCID reasonably believed nondisclosure was authorized by the Sunshine Law.

Spradlin v. City of Fulton, 982 S.W.2d 255 (Mo. banc 1998)

Hemeyer v. KRCG-TV, 6 S.W.3d 880 (Mo. banc 1999)

Guyer v. City of Kirkwood, 38 S.W.3d 412 (Mo. banc 2001)

Buckner v. Burnett, 908 S.W.2d 908 (Mo. App. W.D. 1995)

§ 610.021, RSMo.

§ 610.027, RSMo.

Argument

I. The trial court erred in failing to find that that RWCID knowingly or purposely violated the Missouri Sunshine Law, declining to impose a civil penalty against RWCID, and denying Strake's Request for attorneys' fees and costs because the undisputed facts demonstrate, by a preponderance of the evidence, that RWCID knowingly or purposely violated the Sunshine Law when it failed to disclose the requested records in that the facts do not support a finding that RWCID reasonably believed nondisclosure was authorized by the Sunshine Law.

A. Standard of Review

"Summary judgment is designed to permit the trial court to enter judgment, without delay, where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). "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." *Id.* A grant of summary judgment will be upheld "if (1) there is no genuine dispute of material fact, and (2) the movant is entitled to judgment as a matter of law." *Laut v. City of Arnold*, 417 S.W.3d 315, 318 (Mo. App. E.D. 2013). In the present case, summary judgment was entered against Strake and in favor of RWCID on the issue of whether RWCID knowingly or purposely violated the Sunshine Law and the related denial of Strake's

request for a civil penalty, attorneys' fees, and costs. (LF 83, 111-14; Supp. LF 1-2). Thus, the facts must be viewed in the light most favorable to Strake.

Appellate review of summary judgments is "essentially *de novo*," and "[t]he criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376. Because the trial court's grant of summary judgment is an issue of law and is based on the submitted record, the "appellate court need not defer to the trial court's order granting summary judgment." *Id.*

Statutory interpretation is a question of law subject to de novo review. *Finnegan v. Old Republic Title Co. of St. Louis*, 246 S.W.3d 928, 930 (Mo. banc 2008).

B. Argument

RWCID violated the Sunshine Law by refusing to disclose, among other things, the settlement agreement, minutes, and votes.

There is no evidence that the settlement agreement, minutes, votes, and amount of legal fees paid were ever closed records. Although a public governmental body *may* take the necessary measures to close certain records, meetings, or votes related to legal actions, nothing *requires* a body to close such records. § 610.021(1). Such closure is permissive, not mandatory. *See Guyer v. City of Kirkwood*, 38 S.W.3d 412, 414 (Mo. banc 2001) (discussing "the permissive closure available in section 610.021"); *see also Chasnoff v. Bd. of Police Comm'rs*, 334 S.W.3d 147, 151 (Mo. App. E.D. 2011) (noting

that "[s]ection 610.021 is 'permissive,' because it describes records that *may* be closed[, and n]othing in section 610.021 mandates the closure of records").

Moreover, even had RWCID sought to close some of the requested records, the Sunshine Law provides that any closure of litigation-related records is further limited in that "any minutes, vote or settlement agreement relating to legal actions, cause of action or litigation involving a public governmental body … shall be made public upon final disposition of the matter … unless, prior to final disposition, the settlement is ordered closed by a court." § 610.021(1). To allow any records to remain closed after litigation, a court must enter "a written finding that the adverse impact to a plaintiff or plaintiffs to the action clearly outweighs the public policy considerations of section 610.011." *Id.* No such order was entered in the *Michael* case. Thus, as the trial court pointed out, the "plain terms of the applicable law" required disclosure of the settlement agreement. (LF 113). The law is equally clear as it relates to disclosure of the minutes and votes that RWCID refused to disclose to Strake.

The Sunshine Law provides specific penal remedies for knowing and purposeful violations. "Initially, the Sunshine Law (which was adopted in 1973) had no teeth." *Kansas City Star Co. v. Shields*, 771 S.W.2d 101, 104 (Mo. App. W.D. 1989). "These remedies were added to beef up and to deter violation of the already stated public policy of the law, as spoken loudly and clearly in the General Assembly, to open the business of the government to the people." *Id.* The first remedies were available only in cases of a purposeful violation. *See supra* note 7. In 1998, this Court cautioned, "members of governmental bodies are on notice that the provisions of the open meetings law will be

strictly enforced and that our trial courts will have less latitude to avoid a finding of a purposeful violation." *Spradlin*, 982 S.W.2d at 263. Moreover, after *Spradlin*, the legislature strengthened the Sunshine Law by adding a civil penalty and allowing for an award of attorneys' fees for knowing violations. *See* SB 869, 92d Gen. Assemb., 2d Reg. Sess. (Mo. 2004). The remedies available for Sunshine Law violations and their proper enforcement by Missouri courts are critical because, "[w]ithout the availability of attorneys' fees for those who prove violations of the statute, enforcement of the statute is left to wealthy gadflies and media owners who care enough to bring suit to vindicate the public's right to know." *Spradlin*, 982 S.W.2d at 267 (Wolff, J., concurring in part and dissenting in part).

The violation here was purposeful or knowing. Despite the unambiguous provisions of the law mandating that the records be disclosed, RWCID consulted an attorney. Section 610.027.6 allows a governmental body the option of seeking a formal opinion from counsel when it has doubt about the legality of closing a certain record under the Sunshine Law. In refusing to disclose the records, RWCID attached a short letter from an attorney recommending that RWCID not disclose public records absent a court order.

However, the attorney consulted by RWCID did not suggest that the settlement agreement, votes, or minutes could be hidden from the public under the Sunshine Law. Nor could she have. Section 610.021(1) specifically provides that, absent circumstances not present here, settlement agreements, votes, and minutes may not be closed under the Sunshine Law. In amending this section, the legislature abrogated the decision in *Tuft v.*

City of St. Louis, 936 S.W.2d 113, 115 (Mo. App. E.D. 1996), *opinion adopted and reinstated after retransfer*, (Jan. 28, 1997), which had held that settlement agreements could be closed at the discretion of a governmental body.

As to the settlement agreement, the attorney opined that disclosing the record without a court order might expose RWCID to damages for breach of contract. (LF 33).[8] With regard to the votes and minutes, the attorney wrote that they "cannot be produced pursuant to the work product doctrine." *Id*. Thus, the advice of counsel was to withhold the records in violation of the Sunshine Law, not that the records could be closed under the Sunshine Law. Indeed, the attorney said that, "[w]hile … cognizant of [section] 610.021, we believe the most prudent course is to refuse these requests absent a [c]ourt [o]rder to produce the requested documents." (LF 34). Moreover, the attorney did not suggest that there would be a defense under the Sunshine Law if Strake filed suit, but rather that, "[s]hould Mr. Strake proceed to pursue these request in [c]ourt, we may need to file [a m]otion for [p]rotective [o]rder to prevent disclosure of the requested documents." *Id.*

A further indication that RWCID understood that it was refusing to disclose records that are open under the Sunshine Law is that RWCID failed to seek a court determination as to whether the records could be closed under the law. *See* § 610.027.6 ("A public governmental body which is in doubt about the legality of closing a particular

[8] The plain language of the settlement agreement provides that it may be disclosed as required by law. (Ex. A).

meeting, record or vote may bring suit at the expense of that public governmental body in the circuit court of the county of the public governmental body's principal place of business to ascertain the propriety of any such action[.]"). Nearly eight months passed between Strake's Sunshine Law request to RWCID and his filing of the Petition in this case. Had RWCID sought a court determination, doing so would have been at RWCID's expense and RWCID would have been responsible for Strake's attorneys' fees. *See Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 883-84 (Mo. banc 1999).

Where a public governmental body "knowingly violated [the Sunshine Law], the public governmental body … shall be subject to a civil penalty in an amount up to one thousand dollars." § 610.027.3. Additionally, a court may order the violating party to pay "all costs and reasonable attorney fees to any party successfully establishing a violation." *Id.* Likewise, where a public governmental body has purposely violated the Sunshine Law, the violator "shall be subject to a civil penalty in an amount up to five thousand dollars." § 610.027.4. Moreover, "the court shall order the payment by such body or member of all costs and reasonable attorney fees to any party successfully establishing such a violation." *Id*. In either instance, the amount of the civil penalty is determined by "the size of the jurisdiction, the seriousness of the offense, and whether the public governmental body or member … has violated [the Sunshine Law] previously." §§ 610.027.3-.4.

RWCID's violation of the Sunshine Law was purposeful. The Court of Appeals has held that, "[a] public official's intentionally forestalling production of public records until the requester sues would be a purposeful violation of Chapter 610 and would be

subject to a fine and reasonable attorney fees." *Buckner v. Burnett*, 908 S.W.2d 908, 911 (Mo. App. W.D. 1995).[9] The court concluded "that Chapter 610 would be a hollow law if it permitted a custodian intentionally to forestall production of public records until the requester sued[.]" *Id.* This interpretation is consistent with this Court's holding that, "[t]o purposely violate the open meetings [provisions of the Sunshine Law,] a member of a public governmental body must exhibit a 'conscious design, intent, or plan' to violate the law and do so 'with awareness of the probable consequences.'" *Spradlin*, 982 S.W.2d at 262. It is also consistent with the legislature's decision to make the governmental body responsible for the costs of suit, including the requesting citizen's attorneys' fees, where the governmental body itself initiates a court action to determine whether a public record is "closed" under the Sunshine Law. *See Hemeyer*, 6 S.W.3d at 883-84. Indeed, a different interpretation provides a disincentive for a governmental body with doubts to seek a court determination (and be responsible for attorneys' fees and costs) rather than to sit back and wait to see if a citizen has the resources and wherewithal to mount litigation.

In *Spradlin*, this Court held that "[e]ngaging in conduct reasonably believed to be authorized by statute does not amount to a purposeful violation." 982 S.W.2d at 263. In *Spradlin*, unlike here, there was a dispute about the meaning of an ambiguous term in the Sunshine Law provisions permitting closed meetings. *Id.* at 257-58. Because of the ambiguity, the court found that the violation was not purposeful. *Id.* at 263. Nevertheless,

---

[9] This Court favorably noted *Buckner*'s holding on this point. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 n.10 (Mo. banc 1998).

this Court cautioned that, "[h]ereafter … members of governmental bodies are on notice that the provisions of the [Sunshine Law] will be strictly enforced and that our trial courts will have less latitude to avoid a finding of a purposeful violation." *Id.* In this case, while RWCID might have mistakenly believed that a contract or privilege forbade disclosure of public records, RWCID's rejection of Strake's request for public records never pointed to any statute that RWCID believed authorized its resistance to complying with the Sunshine Law. Moreover, the attorney's advice was *not* that the records were closed under the Sunshine Law. Furthermore, RWCID had the benefit of this Court's notice from *Spradlin* that the Sunshine Law would be strictly enforced.

This Court has not had the opportunity to interpret the term "knowingly" in the context of the Sunshine Law.[10] "'It is a basic rule of statutory construction that words should be given their plain and ordinary meaning whenever possible.'" *Id.* at 258 (quoting *State ex rel. Maryland Heights Fire Prot. Dist. v. Campbell*, 736 S.W.2d 383,

---

[10] The Eastern District has noted that, "[a] federal district court interpreting Missouri law has held that to establish a 'knowing' violation of the Sunshine Law, a plaintiff must show that that the defendant had 'actual knowledge that the conduct violated a statutory provision.'" *White v. City of Ladue*, 422 S.W.3d 439, 452 (Mo. App. E.D. 2013), *reh'g and/or transfer denied* (Jan. 30, 2014), *transfer denied* (Mar. 25, 2014) (quoting *Wright v. City of Salisbury, Mo.*, No. 2:07CV00056, 2010 WL 2947709, at *5 (E.D. Mo. July 22, 2010)).

387 (Mo. banc 1987)). A word's ordinary meaning is derived from the dictionary. *Id.* at 262. The dictionary defines "knowing" as "[h]aving or showing awareness or understanding; well-informed[;] … [d]eliberate; conscious." BLACK'S LAW DICTIONARY 950 (9th ed. 2009). "Knowledge" is defined as "[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact." *Id.*[11]

[11] In *Wright*, the United States District Court for the Eastern District of Missouri suggested that "actual knowledge" must be demonstrated to show a knowing violation of the Sunshine Law. 2010 WL 2947709, at *5. Actual knowledge is defined as "[d]irect and clear knowledge, as distinguished from constructive knowledge[;] … [k]nowledge of information that would lead a reasonable person to inquire further." BLACK'S LAW DICTIONARY 950 (9th ed. 2009). Given that governmental bodies are generally charged with knowledge of the law and this Court's specific notice in *Spradlin* that the Sunshine Law would be strictly enforced, a better interpretation of the statute is to permit demonstration of constructive knowledge. Constructive knowledge is defined as "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." *Id.* It is not necessary to resolve the question in this case, however, because RWCID did possess actual knowledge of the Sunshine Law provisions it chose not to follow without a court order. *See* (LF 34) ("While we are cognizant of RSMO 610.021, we believe the most prudent course is to refuse these requests absent a Court Order to produce the requested documents. Should Mr. Strake

A knowing violation is different than a purposeful violation. "This Court must presume every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language." *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. banc 2013). The legislature added penalties for a knowing violation of the Sunshine Law after this Court's decision in *Spradlin* interpreting what constitutes a purposeful violation. Interpreting a knowing violation as the same, or virtually the same, as a purposeful violation would render the legislature's addition to section 610.027 superfluous. *See supra* note 7.

A knowing violation is also less culpable that a purposeful violation. Even when two statutory provisions appear to be in conflict, they must be read in harmony. *Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 33 (Mo. banc 2015). Here, this Court can avoid conflict between the more punitive consequences for a purposeful violation and the lesser penalty for a knowing violation by interpreting a knowing violation as less culpable than a purposeful violation. By adding a sanction for a knowing violation, but

---

proceed to pursue these requests in Court, we may need to file Motion for Protective Order to prevent the disclosure of the requested documents.").

making those sanctions less burdensome on the governmental body, the legislature evidenced its intent to add more teeth to the Sunshine Law by imposing a penalty and allowing for recovery of attorneys' fees and costs in cases where the decision to violate the Sunshine Law was done with less than a "'conscious design, intent, or plan' to violate the law ... 'with awareness of the probable consequences'"—i.e., less than purposeful. *Spradlin*, 982 S.W.2d at 262.

Here, in declining to impose a civil penalty and denying Strake's request for an award of attorneys' fees and costs, the trial court found that RWCID had "two mutually conflicting obligations" as it was bound both by the confidentiality clause and the provisions of the Sunshine Law requiring disclosure. (LF 113).[12] The trial court also found that RWCID did not disclose the requested documents because it "was relying on the advice of counsel to avoid a lawsuit for breach of contract." (LF 113). The trial court, however, overlooked the critical fact that RWCID refused to disclose public records to Strake without providing any reason why they could be withheld under the Sunshine Law. These circumstances do not support a finding that RWCID reasonably believed it was complying with the Sunshine Law. There is no ambiguity in the Sunshine Law's requirement that the settlement agreement, votes, and minutes are open records, and neither RWCID nor the attorney who advised it suggested the contrary.

---

[12] The trial court was mistaken as the settlement agreement provided that it could be disclosed if required by law. (Ex. A).

In this case, RWCID intentionally withheld public records requested under the Sunshine Law until Strake secured a court order that they be disclosed. RWCID did not withhold the records based upon a reasonable belief that they could be closed under the Sunshine Law. Instead, RWCID cited, as to the settlement agreement, its purported concern of a possible lawsuit for breach of contract (a lawsuit that was unlikely to occur given the confidentiality clause upon which RWCID's fear was based specifically stated that the agreement could be disclosed if required by law) and, as to the votes and minutes, the notion that a privilege prohibited disclosure of records that the Sunshine Law explicitly states are open. There is no question RWCID violated the Sunshine Law. The legal advice RWCID claims excuses its violation of the Sunshine Law was *not* that the record could be closed under the Sunshine Law. Thus, the trial court's ruling that RWCID can wait to be sued to disclose records that are open under the Sunshine Law—as long as its attorney advises it to wait for reasons that have nothing to do with the Sunshine Law—and thereby escape a finding that the violation of the Sunshine Law is knowing or purposeful should be reversed.

Conclusion

RWCID knowingly and purposely violated the Sunshine Law when it refused to disclose the public records requested by Strake. This Court should reverse the portion of the trial court's judgment on the issue of Strake's request for a civil penalty, attorneys' fees, and costs; find that RWCID's violation of the Sunshine Law was purposeful, or, in the alternate, knowing; and remand for imposition of a civil penalty and award of Stake's attorneys' fees and costs.

Respectfully submitted,

/s/ Anthony E. Rothert
ANTHONY E. ROTHERT #44827
ANDREW MCNULTY #67138
AMERICAN CIVIL LIBERTIES
UNION OF MISSOURI FOUNDATION
454 Whittier Street
St. Louis, Missouri 63108
Phone: (314) 652-3114
Fax: (314) 652-3112
trothert@aclu-mo.org
amcnulty@aclu-mo.org

GILLIAN R. WILCOX, #61278
AMERICAN CIVIL LIBERTIES
UNION OF MISSOURI FOUNDATION
3601 Main Street
Kansas City, Missouri64111
Phone: (816) 470-9938
Fax: (314) 652-3112
gwilcox@aclu-mo.org

Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on June 8, 2015, the foregoing brief was filed electronically and served automatically on the counsel for Respondent.

The undersigned certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains 4,558 words.

The undersigned certifies that the filed electronic copy of the brief has been scanned for viruses and is virus-free.

/s/ Anthony E. Rothert

TABLE OF CONTENTS - APPENDIX

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI

21st JUDICIAL CIRCUIT

JOHN P. STRAKE, Plaintiff, vs. ROBINWOOD WEST COMMUNITY IMPROVEMENT DISTRICT, Defendant.	)	Cause No. 09SL-CC02321 Division 14

Order and Judgment

Before the Court is the Plaintiff's Motion for Summary Judgment, filed pursuant to Rule 74.04(a), asserting that there are no material facts in genuine dispute relative to his claim that Defendant Robinwood West Community Improvement District (RWCID) has failed to disclose documents which he asserts are "public" within the meaning of Chapter 610 of the Missouri Revised Statutes (the "Missouri Sunshine Law"). The documents at issue relate to a settled lawsuit by another resident against Defendant RWCID. After this lawsuit settled, Mr. Strake (through counsel), made a "Sunshine Law request for "a. any agreements made by RWCID or on behalf of RWCID; b. any minutes or votes taken by the RWCID Board; c. any legal bills, including legal bills that may have been pain on behalf of Jerold Polt; and d. correspondence among RWCID, its insurance company, and attorneys representing RWCID, its Board, or [Jerold] Polt."

The Court takes judicial notice of its file. The Court considers the arguments of counsel, both written and verbal. The Court considers the authorities cited to it. Being fully advised in the premises, the Court finds and orders as provided below.

Legal Standard:

"Summary judgment is appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to summary judgment as a matter of law." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. Banc 1993). This standard requires the Court to view the facts in a light most favorable to the non-moving party. *Id.* at 376.

Section **610.011** RSMo. provides:

1. 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. Sections 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed to promote this public policy.

2. Except as otherwise provided by law, all public meetings of public governmental bodies shall be open to the public as set forth in section 610.020, all public records of public governmental bodies shall be open to the public for inspection and copying as set forth in sections 610.023 to 610.026, and all public votes of public governmental bodies shall be recorded as set forth in section 610.015.

Section **610.021** RSMo. provides:

Except to the extent disclosure is otherwise required by law, *a public governmental body is authorized to close* meetings, records and votes, *to the extent they relate to the following*:

(1) Legal 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. However, *any minutes, vote or settlement agreement* relating to legal actions, causes of action or litigation involving a public governmental body or any agent or entity representing its interests or acting on its behalf or with its authority, *including any insurance company acting on behalf of a public government body as its insured, shall be made public upon* final disposition of the matter voted upon or upon *the signing by the parties of the settlement agreement, unless, prior to final disposition, the settlement agreement is ordered closed* by a court after a written finding that the adverse impact to a plaintiff or plaintiffs to the action clearly outweighs the public policy considerations of section 610.011, however, *the amount of any moneys paid by, or on behalf of, the public governmental body shall be disclosed*; provided, however, in matters involving the exercise of the power of eminent domain, the vote shall be announced or become public immediately following the action on the motion to authorize institution of such a legal action. *Legal work product shall be considered a closed record.*

Section **610.024** RSMo. provides:

1. If a public record contains material which is not exempt from disclosure as well as material which is exempt from disclosure, *the public governmental body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying.*

2. When designing a public record, a public governmental body shall, to the extent practicable, facilitate a separation of exempt from nonexempt information. If the separation is readily apparent to a person requesting to inspect or receive copies of the form, the public governmental body shall generally describe the material exempted unless that description would reveal the contents of the exempt information and thus defeat the purpose of the exemption.

Findings and Orders:

Plaintiff is a resident, residing in RWCID. RWCID is a [p]ublic governmental body within the definition of §610.010(4) RSMo. On or about November 16, 2012, RWCID received a records request from Plaintiff, seeking the copies of documents referenced above. RWCID responded to Mr. Strakes' by acknowledging receipt of his Sunshine Law request, but did not comply.

Settlement Agreement: All parties agree that the settlement agreement in the underlying lawsuit, about which Plaintiff seeks disclosure under the Sunshine Law, has been signed but was not ordered closed by any court prior to final disposition. The Court finds that this settlement agreement, produced for the Court's review *in camera,* contains a confidentiality agreement, stating that the terms of the settlement and any release thereof shall remain confidential unless there is an order of the Court. Under the plain terms of § 610.021(1), the settlement agreement must be disclosed upon order of the Court. The Court specifically finds, however, that RWCID has two mutually conflicting obligations; it is bound by the terms of its contract to keep its settlement agreement confidential until the Court ordered it released, but it is also subject to the provisions of the Sunshine Law if it did not release the agreement. The Court finds that RWCID was relying on the advice of counsel to avoid a lawsuit for breach of contract. While the Court orders the disclosure of the settlement agreement, pursuant to the plain terms of applicable law, the

Court declines to award a civil fine or attorneys' fees, as requested by the plaintiff. *Spradlin v. City of Fulton*, 982 S.W.2d 255 (Mo. banc 1998).

Other items: Plaintiff has requested the disclosure of other items, which are "minutes or votes taken by the RWCID Board; legal bills, including those that may have been paid on behalf of Jerold Polt; and correspondence among RWCID, its insurance company and attorneys representing RWCID, its Board, or Polt."

1. Minutes or votes: To the extent that such items do not already appear on the RWCID website, RWCID shall make same public forthwith, pursuant to §610.021(1) RSMo., in that the matter has been finally disposed.

2. Legal bills: While RWCID cannot be forced to disclose items (legal bills) not in its possession, the plain language of §610.021(1) requires them to disclose "the *amount* of any monies paid by, or on behalf of, the public governmental body…" Thus, the statutory language requires full disclosure of the sums of money expended, without requiring the actual legal bills to be produced.

3. Correspondence: Section §610.021(1) provides that "legal work product shall be considered a closed record." The Court finds that the correspondence requested by the plaintiff is clearly privileged – either as "attorney/client" or as "insured/insurer" priviledge – and are the legal work product protected by statute. The plaintiff's requests as to these materials is denied.

WHEREFORE, for the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment is granted in part and denied in part. Respondent shall disclose the settlement agreement and all "minutes or votes" taken by the RWCID Board, if not already posted on the public web site. To the extent that any such minutes or votes remain to be "approved," RWCID shall proceed to take such action forthwith. Further, Respondent RWCID shall disclose the total amount of monies paid by or on behalf of the governmental body, without being required to produce the

underlying legal bills for Plaintiff's inspection. Finally, Plaintiff's motion for partial summary judgment requiring the respondent to disclose the requested correspondent is denied. All requests for attorney fees and costs are denied.

All other orders of the Court to remain.

SO ORDERED:

1-21-14

Kristine Allen Kerr
Circuit Judge, Division 14

cc: Copies to all parties, through counsel of record.

IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
21st JUDICIAL CIRCUIT

JOHN P. STRAKE, Plaintiff, vs. ROBINWOOD WEST COMMUNITY IMPROVEMENT DISTRICT, Defendant.	)	Cause No. 13SL-CC02321 Division 14

ORDER (Nunc Pro Tunc to January 21, 2014)

Pursuant to this Court's Order, dated December 11, 2013, the above-noted case involves legal issues only, and a grant of summary judgment to one party renders a denial of summary judgment to the other party on that issue; likewise, a denial of summary judgment to one party renders a grant of summary judgment to the other party on that issue. The Order and Judgment, dated January 21, 2014, disposes of all issues in this cause of action and is final for the purposes of appeal. Relating to all findings made in the Order and Judgment dated January 21, 2014, it was this Court's intention that said findings were final determinations and this Court had no intention of further evidence being heard on the matter.

The correct case number is 13SL-CC02321. An incorrect case number appears on several filed documents, including the January 21, 2014 Order and Judgment.

The Motion for Summary Judgment filed by Plaintiff resolves all issues and was not, as incorrectly referred to in some filed documents, including the January 21, 2014 Order and Judgment, a Motion for "Partial" Summary Judgment.

All other findings and orders from the January 21, 2014 Order and Judgment remain.

This order causes the record to conform to this Court's previously made judicial determinations and corrects clerical errors only.

SO ORDERED:

Kristine Allen Kerr
Circuit Judge, Division 14

4-11-14
Date

Cc: Copies to all parties, through counsel of record.

SANDBERGPHOENIX
& VON GONTARD P.C.

Kathryn M. Huelsebusch
Attorney

600 Washington Avenue - 15th Floor
St. Louis, MO 63101-1313
Tel: 314.446.4345
Fax: 314.241.7604
khuelsebusch@sandbergphoenix.com
www.sandbergphoenix.com

VIA E-MAIL AND U.S. MAIL

December 7, 2012

Mr. Steve O'Rourke
President
Robinwood West Community Improvement District
12556 Merrick Drive
St. Louis, MO 63146

Dear Mr. O'Rourke:

Please accept this letter as our response to your request to review and provide legal analysis of the enclosed request for records from Mr. John Strake as it pertains to the case of *Stephanie Michael v. Robinwood West Community Improvement District*, Cause Number 10SL-CC00697, in the Circuit Court of St. Louis County.

Regarding request number one, RWCID may not produce a copy of the Release of All Claims from *Michael v. RWCID* without exposing the district to damages for breach of contract. The Release of All Claims contains a confidentiality clause which states that the terms of the release cannot be disclosed by RWCID or Stephanie Michael unless ordered by law or a Court.

Regarding request number two, all minutes and records of votes of the RWCID Board regarding *Michael v. RWCID* are confidential and cannot be produced pursuant to the work product doctrine. The work product doctrine protects a party's tangible and intangible materials collected or created in anticipation of litigation and for its defense.

Regarding request number three, RWCID should not have a copy of the legal bills regarding *Michael v. RWCID* to produce in response to this request because they were sent directly to the insurance company.

Regarding request number four, RWCID may not produce any written communications between RWCID, the RWCID board, RWCID's attorneys, or RWCID's insurance company regarding *Michael v. RWCID*. These communications are confidential because they are protected from disclosure by the attorney-client privilege and insurer-insured privilege.

While we are cognizant of RSMO 610.021, we believe the most prudent course is to refuse these requests absent a Court Order to produce the requested documents. Should Mr. Strake proceed to pursue these requests in Court, we may need to file Motion for Protective Order to prevent the disclosure of the requested documents.

Thank you for your request. Please do not hesitate to contact us if you have questions or need additional assistance.

Very truly yours,

Kathryn M. Huelsebusch

KMH/kaw

Enclosure

3926948.1

RELEASE OF ALL CLAIMS

The undersigned, being of lawful age, for the sole consideration of Seventy-Five Thousand Dollars and 00/100 ($75,000.00) the undersigned in hand paid, receipt of which is hereby acknowledged, does hereby and for her heirs, executors, administrators, successors and assigns, release, acquit and forever discharge Robinwood West Community Improvement District and Jerold Polt, The Philadelphia Insurance Companies, and their agents (actual or apparent), servants, employees, owners, attorneys, successors, heirs, executors, subsidiaries, and administrators of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned now has or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen injuries and damages and the consequences thereof resulting or to result from the alleged incident regarding Stephanie Michael on or about August 25 2009, as is more fully set out in a suit filed in the Circuit Court of St. Louis County, State of Missouri, bearing Cause No. 10SL-CC00697 wherein the undersigned, Stephanie Michael, is the plaintiff and Robinwood West Community Improvement District and Jerold Polt are the defendants.

Furthermore, the parties hereby released are released from any liability to any person or entity for contribution or apportionment of fault.

This release shall also release the released parties and their attorneys from any claims related to the conduct of the released parties and/or their attorneys in their defense of this claim/lawsuit.

It is understood and agreed that this settlement is the compromise of a doubtful and disputed claim, and that the payment made is not to be construed as an admission of liability on

EXHIBIT
tabbies
A

the part of the parties hereby released or any of them, and that said parties released deny liability therefore and intend merely to avoid further litigation and buy their peace.

To procure the payment of said sum, the undersigned hereby declares that no representations about the nature and extent of any injuries or damages made by any attorney or agent of the party released, have induced her to execute this Release and that in determining the said sum there has been taken into consideration not only the ascertained damages, but also the possibility that the damages sustained may be permanent and progressive and recovery there from uncertain and indefinite and that other damage may become apparent at some future time, so that consequences not now anticipated may result from said incident, casualty, or event.

The undersigned further agrees, as a consideration and inducement for this Release, that it shall apply to all unknown and unanticipated damages directly and indirectly resulting from the said incident, event or accident, as well as to those now disclosed.

All parties agree that this Release shall not be used as precedent in any other claim, suit, cause or hearing. Any attempt to use this Release as precedent for any other case shall be considered a material breach of the agreement and shall subject the breaching party to damage.

The undersigned shall indemnify, defend and hold harmless all persons or entities released herein as to any and all liens, including but not limited to United States Government, Department of the Army, and/or TriCare liens.

This Release was entered into in good faith based upon arms-length negotiation between the parties and their counsel. The Release is intended to and shall serve as a bar to all claims for contribution and indemnity.

The undersigned and her attorney agree to the dismissal with prejudice of all claims against Robinwood West Community Improvement District and Jerold Polt made in the lawsuit

pending in the Circuit Court of St. Louis County, State of Missouri, bearing Cause No. 10SL-CC00697, with all parties to this Release agreeing to pay their own costs.

This Release constitutes the entire agreement among the parties and no other understandings or agreements, written or oral, shall be used to interpret this agreement.

The terms of this settlement and release shall remain confidential unless required by law, order of the court or as necessary to complete probate and settlement of the case. The parties agree that the reciprocal confidentiality given by each party shall be consideration for the confidentiality provisions contained herein.

The undersigned acknowledges that she has consulted an attorney of her choice regarding this Release. The undersigned acknowledges that she fully understands this Release and the effect of signing the agreement.

CAUTION: READ BEFORE SIGNING:

Signed and sealed this 12 day of June, 2012.

Stephanie Michael, Plaintiff

I, Joseph L. Racine, have fully explained the terms of the foregoing Release to my client and she has indicated that she fully understands the terms, effect and implications of affixing her signature hereto. The foregoing was signed by Stephanie Michael in my presence and of her own free will and volition.

Joseph L. Racine, Attorney At Law

Missouri Revised Statutes

Chapter 610
Governmental Bodies and Records

←610.020

Section 610.021.1

610.022→

August 28, 2014

Closed meetings and closed records authorized when, exceptions.

610.021. Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close meetings, records and votes, to the extent they relate to the following:

(1) Legal 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. However, any minutes, vote or settlement agreement relating to legal actions, causes of action or litigation involving a public governmental body or any agent or entity representing its interests or acting on its behalf or with its authority, including any insurance company acting on behalf of a public government body as its insured, shall be made public upon final disposition of the matter voted upon or upon the signing by the parties of the settlement agreement, unless, prior to final disposition, the settlement agreement is ordered closed by a court after a written finding that the adverse impact to a plaintiff or plaintiffs to the action clearly outweighs the public policy considerations of section 610.011, however, the amount of any moneys paid by, or on behalf of, the public governmental body shall be disclosed; provided, however, in matters involving the exercise of the power of eminent domain, the vote shall be announced or become public immediately following the action on the motion to authorize institution of such a legal action. Legal work product shall be considered a closed record;

(2) Leasing, purchase or sale of real estate by a public governmental body where public knowledge of the transaction might adversely affect the legal consideration therefor. However, any minutes, vote or public record approving a contract relating to the leasing, purchase or sale of real estate by a public governmental body shall be made public upon execution of the lease, purchase or sale of the real estate;

(3) Hiring, firing, disciplining or promoting of particular employees by a public governmental body when personal information about the employee is discussed or recorded. However, any vote on a final decision, when taken by a public governmental body, to hire, fire, promote or discipline an employee of a public governmental body shall be made available with a record of how each member voted to the public within seventy-two hours of the close of the meeting where such action occurs; provided, however, that any employee so affected shall be entitled to prompt notice of such decision during the seventy-two-hour period before such decision is made available to the public. As used in this subdivision, the term "personal information" means information relating to the performance or merit of individual employees;

(4) The state militia or national guard or any part thereof;

(5) Nonjudicial mental or physical health proceedings involving identifiable persons, including medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment;

(6) Scholastic probation, expulsion, or graduation of identifiable individuals, including records of individual test or examination scores; however, personally identifiable student records maintained by public educational institutions shall be open for inspection by the parents, guardian or other custodian of students under the age of eighteen years and by the parents, guardian or other custodian and the student if the student is over the age of eighteen years;

(7) Testing and examination materials, before the test or examination is given or, if it is to be given again, before so given again;

(8) Welfare cases of identifiable individuals;

(9) Preparation, including any discussions or work product, on behalf of a public governmental body or its representatives for negotiations with employee groups;

(10) Software codes for electronic data processing and documentation thereof;

(11) Specifications for competitive bidding, until either the specifications are officially approved by the public governmental body or the specifications are published for bid;

(12) Sealed bids and related documents, until the bids are opened; and sealed proposals and related documents or any documents related to a negotiated contract until a contract is executed, or all proposals are rejected;

(13) Individually 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, and the names of private sources donating or contributing money to the salary of a chancellor or president at all public colleges and universities in the state of Missouri and the amount of money contributed by the source;

(14) Records which are protected from disclosure by law;

(15) Meetings and public records relating to scientific and technological innovations in which the owner has a proprietary interest;

(16) Records relating to municipal hotlines established for the reporting of abuse and wrongdoing;

(17) Confidential or privileged communications between a public governmental body and its auditor, including all auditor work product; however, all final audit reports issued by the auditor are to be considered open records pursuant to this chapter;

(18) Operational guidelines, policies and specific response plans developed, adopted, or maintained by any public agency responsible for law enforcement, public safety, first response, or public health for use in responding to or preventing any critical incident which is or appears to be terrorist in nature and which has the potential to endanger individual or public safety or health. Financial records related to the procurement of or expenditures relating to operational guidelines, policies or plans purchased with public funds shall be open. When seeking to close information pursuant to this exception, the public governmental body shall affirmatively state in writing that

disclosure would impair the public governmental body's ability to protect the security or safety of persons or real property, and shall in the same writing state that the public interest in nondisclosure outweighs the public interest in disclosure of the records;

(19) Existing or proposed security systems and structural plans of real property owned or leased by a public governmental body, and information that is voluntarily submitted by a nonpublic entity owning or operating an infrastructure to any public governmental body for use by that body to devise plans for protection of that infrastructure, the public disclosure of which would threaten public safety:

(a) Records related to the procurement of or expenditures relating to security systems purchased with public funds shall be open;

(b) When seeking to close information pursuant to this exception, the public governmental body shall affirmatively state in writing that disclosure would impair the public governmental body's ability to protect the security or safety of persons or real property, and shall in the same writing state that the public interest in nondisclosure outweighs the public interest in disclosure of the records;

(c) Records that are voluntarily submitted by a nonpublic entity shall be reviewed by the receiving agency within ninety days of submission to determine if retention of the document is necessary in furtherance of a state security interest. If retention is not necessary, the documents shall be returned to the nonpublic governmental body or destroyed;

(20) The portion of a record that identifies security systems or access codes or authorization codes for security systems of real property;

(21) Records that identify the configuration of components or the operation of a computer, computer system, computer network, or telecommunications network, and would allow unauthorized access to or unlawful disruption of a computer, computer system, computer network, or telecommunications network of a public governmental body. This exception shall not be used to limit or deny access to otherwise public records in a file, document, data file or database containing public records. Records related to the procurement of or expenditures relating to such computer, computer system, computer network, or telecommunications network, including the amount of moneys paid by, or on behalf of, a public governmental body for such computer, computer system, computer network, or telecommunications network shall be open;

(22) Credit card numbers, personal identification numbers, digital certificates, physical and virtual keys, access codes or authorization codes that are used to protect the security of electronic transactions between a public governmental body and a person or entity doing business with a public governmental body. Nothing in this section shall be deemed to close the record of a person or entity using a credit card held in the name of a public governmental body or any record of a transaction made by a person using a credit card or other method of payment for which reimbursement is made by a public governmental body; and

(23) Records submitted by an individual, corporation, or other business entity to a public institution of higher education in connection with a proposal to license intellectual property or perform sponsored research and which contains sales projections or other business plan information the disclosure of which may endanger the competitiveness of a business.

(L. 1987 S.B. 2, A.L. 1993 H.B. 170, A.L. 1995 H.B. 562, A.L. 1998 H.B. 1095, A.L. 2002 S.B. 712, A.L. 2004 S.B. 1020, et al., A.L. 2008 H.B. 1450, A.L. 2009 H.B. 191, A.L. 2013 H.B. 256, 33 & 305)

Effective 5-31-13

CROSS REFERENCE:

Child's school records to be released to parents, attorney's fees and costs assessed, when, 452.375

2009	2008	2004	2002	1998

Top

Missouri Revised Statutes

Chapter 610
Governmental Bodies and Records

←610.026

Section 610.027.1

610.028→

August 28, 2014

Violations--remedies, procedure, penalty, purposeful violations--validity of actions by governing bodies in violation--governmental bodies may seek interpretation of law, attorney general to provide.

610.027. 1. The remedies provided by this section against public governmental bodies shall be in addition to those provided by any other provision of law. Any aggrieved person, taxpayer to, or citizen of, this state, or the attorney general or prosecuting attorney, may seek judicial enforcement of the requirements of sections 610.010 to 610.026. Suits to enforce sections 610.010 to 610.026 shall be brought in the circuit court for the county in which the public governmental body has its principal place of business. Upon service of a summons, petition, complaint, counterclaim, or cross-claim in a civil action brought to enforce the provisions of sections 610.010 to 610.026, the custodian of the public record that is the subject matter of such civil action shall not transfer custody, alter, destroy, or otherwise dispose of the public record sought to be inspected and examined, notwithstanding the applicability of an exemption pursuant to section 610.021 or the assertion that the requested record is not a public record until the court directs otherwise.

2. Once a party seeking judicial enforcement of sections 610.010 to 610.026 demonstrates to the court that the body in question is subject to the requirements of sections 610.010 to 610.026 and has held a closed meeting, record or vote, 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.

3. Upon a finding by a preponderance of the evidence that a public governmental body or a member of a public governmental body has knowingly violated sections 610.010 to 610.026, the public governmental body or the member shall be subject to a civil penalty in an amount up to one thousand dollars. If the court finds that there is a knowing violation of sections 610.010 to 610.026, the court may order the payment by such body or member of all costs and reasonable attorney fees to any party successfully establishing a violation. The court shall determine the amount of the penalty by taking into account the size of the jurisdiction, the seriousness of the offense, and whether the public governmental body or member of a public governmental body has violated sections 610.010 to 610.026 previously.

4. Upon a finding by a preponderance of the evidence that a public governmental body or a member of a public governmental body has purposely violated sections 610.010 to 610.026, the public governmental body or the member shall be subject to a civil penalty in an amount up to five thousand dollars. If the court finds that there was a purposeful violation of sections 610.010 to 610.026, then the court shall order the payment by such body or member of all costs and

reasonable attorney fees to any party successfully establishing such a violation. The court shall determine the amount of the penalty by taking into account the size of the jurisdiction, the seriousness of the offense, and whether the public governmental body or member of a public governmental body has violated sections 610.010 to 610.026 previously.

5. Upon a finding by a preponderance of the evidence that a public governmental body has violated any provision of sections 610.010 to 610.026, a court shall void any action taken in violation of sections 610.010 to 610.026, if the court finds under the facts of the particular case that the public interest in the enforcement of the policy of sections 610.010 to 610.026 outweighs the public interest in sustaining the validity of the action taken in the closed meeting, record or vote. Suit for enforcement shall be brought within one year from which the violation is ascertainable and in no event shall it be brought later than two years after the violation. This subsection shall not apply to an action taken regarding the issuance of bonds or other evidence of indebtedness of a public governmental body if a public hearing, election or public sale has been held regarding the bonds or evidence of indebtedness.

6. A public governmental body which is in doubt about the legality of closing a particular meeting, record or vote may bring suit at the expense of that public governmental body in the circuit court of the county of the public governmental body's principal place of business to ascertain the propriety of any such action, or seek a formal opinion of the attorney general or an attorney for the governmental body.

(L. 1982 H.B. 1253, A.L. 1987 S.B. 2, A.L. 1990 H.B. 1395 & 1448, A.L. 1998 H.B. 1095, A.L. 2004 S.B. 1020, et al.)

1998

Top