

# Chapter 4

## MISSOURI SUNSHINE LAW: OPEN MEETINGS AND OPEN RECORDS

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### 10.1 MISSOURI'S PUBLIC POLICY REQUIRES THAT GOVERNMENT BE OPEN TO THE PUBLIC

The Missouri Sunshine Law, §§ 610.010 *et seq.*, RSMo 2000 & Supp. 2004, expressly states that it is the public policy of the State of Missouri that meetings, records, votes, actions, and deliberations of public governmental bodies are to be open to the public. Section 610.011.1, RSMo 2000. *See, Spradlin v. City of Fulton*, 982 S.W.2d 255, 259 (Mo. banc 1998) (Missouri's public policy favors open meetings); *Cohen v. Poelker*, 520 S.W.2d 50, 52 (Mo. banc 1975) (legislature's intent in enacting the Sunshine Law "was that all meetings of members of public governmental bodies at which the people's business is considered must be open to the people and not conducted in secrecy, and also that the records of the body and the votes of its members be open").

### 10.2 PRESUMPTION THAT GOVERNMENT MEETING OR RECORD IS OPEN: EXCEPTIONS TO DISCLOSURE NARROWLY CONSTRUED

Government meetings and records may be closed to the public only where an exception to that policy is expressly set forth in either the Sunshine Law or some other statute. Sections 610.011 and .021, RSMo 2000. The Sunshine Law is to be liberally construed, and its exceptions narrowly construed, to promote Missouri's public policy favoring access to government meetings and records. Section 610.011.1, RSMo 2000 & Supp. 2004 ("§§ 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed to promote this public policy"). *See also, Guyer v. City of Kirkwood*, 38 S.W.3d 412, 414 (Mo. banc 2001); *State ex rel. Moore v. Brewster*, 116 S.W.3d 630, 636 (Mo.App. E.D. 2003); *Smith v. Sheriff*, 982 S.W.2d 775, 778 (Mo.App. E.D. 1998). Where more than one provision of the Sunshine Law applies to a record, the decision to open or close the record must be guided by the express public policy stated in §610.011.1, which is that all records are presumed open. *Guyer*, 38 S.W.3d at 414, *supra*. In effect, § 610.011.1 is a "tiebreaker in favor of disclosure when records fit equally well under two specific but opposite provisions of the Sunshine Law." *Id.*

To determine whether a particular meeting or record is subject to the Sunshine Law, the threshold question is whether the body holding the meeting or retaining the record of interest is a "public governmental body" as that term is defined in the Sunshine Law. Section 610.010(4)(a)-(f), RSMo 2000. If the entity is a public governmental body, and the meeting will include discussions, deliberations, or decisions of "public business," Section 610.010(3), RSMo 2000, it generally must be open to the public. Likewise, if the entity is a public governmental body, generally any record retained by it is subject to disclosure under the Sunshine Law. Section 610.027.2, RSMo 2000 & Supp. 2004. If a meeting is a "public meeting", § 610.010(5), RSMo 2000 & Supp. 2004, or a record is a "public record," § 610.010(6), it must be open to the public unless a statutory exception applies. *See, §10.4, infra.*

### 10.3 DEFINITIONS

#### A. Public Governmental Body: § 610.010(4), .SMo 2000

The Sunshine Law applies statewide at all levels of government. *See, Cohen v. Poelker*, 520 S.W.2d 50, 54 (Mo. banc 1975); *McLachlan v. McNary*, 684 S.W.2d 534, 538 (Mo.App. E.D. 1984) (entity without binding authority may still be a "public governmental body" subject to the Sunshine Law if its determinations affect the public). A public governmental body is defined as "any legislative, administrative or governmental entity created by the constitution or statutes of this state, by order or ordinance of any political subdivision or district, judicial entities when operating in an administrative capacity, or by executive order. Section 610.010(4), RSMo 2000.

Unless otherwise authorized, individual members of a body are not empowered to act and cannot govern; therefore, because members of a body cannot act individually, an individual member is not a governmental body and is not subject to the Sunshine Law. *See, State ex rel. Moore v. Brewster*, 116 S.W.3d 630, 636 (Mo.App.E.D. 2003); *Cohen v. Poelker*, 520 S.W.2d 50, 54 (Mo. banc 1975) (Sunshine Law applies statewide at all levels of government); *McLachlan v. McNary*, 684 S.W.2d 534, 538 (Mo. App. E.D. 1984) (entity without binding authority may still be a “public governmental body” subject to the Sunshine Law if its determinations affect the public).

The following are public governmental bodies as that term is defined in the Sunshine Law:

### **1. Legislative Bodies.**

Any legislative governmental entity created by the Constitution or statutes of this state, by order or ordinance of any political subdivision or district, or by executive order is a public governmental body. Section 610.010(4), RSMo 2000.

### **2. Executives and Executive Bodies.**

Executives themselves, the Governor, mayors and other chief executives are subject to the Sunshine Law. *Id. See, MacLachlan v. McNary*, 684 S.W.2d 534, 537 (Mo.App. E.D. 1984) (county executive, a single member executive body, is a public governmental body); *Tipton v. Barton*, 747 S.W.2d 325, 329 (Mo.App. E.D. 1988) (city coordinator, chief assistant to the mayor, is a public governmental body).

### **3. Administrative Bodies.**

Any administrative governmental entity created by the Constitution or statutes of this State, by order or ordinance of any political subdivision or district, or by executive order are public governmental bodies. Section 610.010(4), RSMo 2000. *See, News-Press and Gazette Co. v. Cathcart*, 974 S.W.2d 576, 759 (Mo.App. W.D. 1998) (county medical examiner is an administrative entity created by statute and is a public governmental body).

### **4. Judicial Bodies.**

Judicial entities, including courts and administrative hearing tribunals, when operating in an administrative capacity, are public governmental bodies subject to the Sunshine Law. Section 610.010(4), RSMo 2000. Otherwise, the Sunshine Law does not apply to courts. *But see*, Mo.Const. Art. I §14 (the courts of justice shall be open to every person); § 476.170, RSMo 2000 (the sitting of every court shall be public and every person may freely attend the same); *In Re Midwest Milk Monopolization Litigation*, 405 F.Supp. 118, 121 (W.D. Mo. 1975) (the notion that a reporter is free to report only that which transpires in the court room, as distinguished from data in the open files of a court, is untenable. The First Amendment protects the right to report pleadings and other data contained in the open files maintained by the clerk’s office, all of which are available for examination by the general public).

### **5. Bodies Which Receive Public Funds.**

Any body, agency, board, bureau, council, commission, or committee supported in whole or in part from state funds are public governmental bodies. Section 610.010(4), RSMo 2000.

### **6. Governing Bodies of Public Universities and Community Colleges.**

Boards of regents, boards of curators, or any other governing body of an institution of higher education that is supported in whole or in part from state funds, including but not limited to public universities and community colleges, are public governmental bodies. Section 610.010(4)(a), RSMo 2000 & Supp. 2004. This provision specifically identifies by name the Curators of the University of Missouri as a public governmental body in § 610.010(4)(a), RSMo 2000.

### **7. Advisory Committees or Commissions.**

Any advisory committee or commission appointed by the governor by executive order is a public governmental body. Section 610.010(4)(b), RSMo 2000.

### **8. State and local agencies.**

State, county, or municipal departments or divisions, or subdistricts of any political subdivision are public governmental bodies. Section 610.010(4)(c), RSMo 2000.

### **9. Bi-State Development Agencies.**

Bi-state development agencies established pursuant to § 70.370, RSMo 2000 & Supp. 2004, are public governmental bodies. Section 610.010(4)(g), RSMo 2000.

### **10. School Districts and Other Special Purpose Districts.**

School districts and other special purpose districts, including but not limited to sewer districts, water districts, and subdistricts of any political subdivision are public governmental bodies. *Id. See, In Re Kansas City Star Co.*, 73 F.3d 191 (8th Cir. 1996) (order of federal district court's Desegregation Monitoring Committee requiring board of directors of school district to meet with DMC in closed session does not violate the Sunshine Law).

### **11. Rulemaking Bodies.**

Any legislative or administrative governmental deliberative body under the direction of three or more elected or appointed members having rulemaking power is a public governmental body. Sections 610.010(4)(d), RSMo 2000. *See, Stewart v. Williams Communications, Inc.*, 85 S.W.3d 29 (Mo.App. W.D. 2002) (for-profit telecommunications utility was not public governmental body even though corporation had power of eminent domain); *Champ v. Poelker*, 755 S.W.2d 383, 390 (Mo. App. E.D. 1988) (industrial development authority which had authority to adopt rules for conduct of its business but did not have power to govern or regulate conduct of others was not a public governmental body).

### **12. Quasi-Judicial Bodies.**

Any other legislative or administrative governmental deliberative body under the direction of three or more elected or appointed members having quasi-judicial power is a public governmental body. *Id. See, Remington v. City of Boonville*, 701 S.W.2d 804, 806 (Mo.App. W.D. 1985) (board of zoning adjustment is subject to the Sunshine Law).

### **13. Advisory Boards or Committees under the Direction of Public Governmental Bodies.**

Any committee appointed by or at the direction or authority of any of the above-named entities is a public governmental body, including any advisory committee appointed for the specific purpose of recommending policy or expenditures. Section 610.010(4)(e), RSMo 2000. *See, MacLachlan v. McNary*, 684 S.W.2d 534 (Mo.App. E.D. 1984) (held Annexation Study Commission, which considered and recommended changes in the counties make up and delivery of governmental services to county executive subject to the Sunshine Law).

### **14. Advisory Bodies to Higher Educational Institutions.**

Any policy advisory body, policy advisory committee, or policy advisory group appointed by a president, chancellor or any other executive officer of any college or university system or individual institution at the direction of the governing body of such institution which is supported in whole or in part with state funds. *Id.*

### **15. Consultants.**

Any record, survey, memorandum, or other document or study prepared and presented to a public governmental body by a consultant or other professional service paid for in whole or in part by public funds is subject to disclosure under the Sunshine Law. *Id.*

### **16. Quasi-Public Governmental Bodies.**

Corporations or associations organized or authorized to do business in the state under the provisions of Chapter 352 (religious and charitable associations), Chapter 353 (urban redevelopment corporations), or 355 (not-for-profit corporations), which also meet one of the following requirements:

- primary purpose is to enter into contracts with public governmental bodies; or
- engages primarily in activities carried out pursuant to an agreement or agreements with public governmental bodies; or
- performs a public function, i.e., is authorized by statute to confer or otherwise advance (e.g., through approval or recommendations):

tax credits;

tax abatement;

public debt;

tax exempt debt;

rights of eminent domain;

contracting of lease back agreements on structures whose annualized payments commit public tax revenues; or

· directly accepts appropriations of money from a public governmental body, but only to the extent a meeting, record or vote relates to such appropriation.

Section 610.010(4)(f), RSMo 2000.

*See, SNL Securities, L.C. v. National Association of Insurance Commissioners*, 23 S.W.3d 734, 737 (Mo.App. W.D. 2000) (NAIC lacks governmental power and is not a public governmental body); *North Kansas City Hospital Board of Trustees v. St. Luke's Northland Hospital*, 984 S.W.2d 113, 118 (Mo.App. W.D. 1998) (not-for-profit corporation created to carry out purposes of municipal hospital and controlled by hospital's board of trustees); *Champ v. Poelker*, 755 S.W.2d 383, 391 (Mo. App. E.D. 1988) (convention bureau was "quasi-public governmental body subject to the Sunshine Law).

## **B. Public Business: § 610.010(3), RSMo 2000.**

Public business includes all matters that relate in any way to the performance of a public governmental body's functions or the conduct of its business. Section 610.010(3), RSMo 2000.

*See, Kansas City Star v. Fulson*, 859 S.W.2d 934 (Mo.App. W.D. 1993) ("public business" encompasses matters over which public governmental body has supervision, control, jurisdiction, or advisory power, and does not include activities to improve communications skills or personal relations; "public business" is not synonymous with matters of "public interest").

## **C. Public Meeting: § 610.010(3), RSMo 2000**

In person, face-to-face or "corporeal" gatherings, and communications by telephone, computers, or other communication equipment, that meet the following requirements:

### **1. Any Discussion of Public Policy.**

Any meeting of a public governmental body at which any public business is discussed, decided, or public policy formulated, whether such meeting is conducted in person or by means of communication equipment, including, but not limited to, conference call, video conference, Internet chat, or Internet message board. Section 610.010(3), RSMo 2000 & Supp. 2004.

Public meetings include a public vote of all or a majority of the members of a public governmental body, by electronic communication or any other means, conducted in lieu of holding a public meeting with the members of the public governmental body gathered at one location to conduct business. *Id.*

*See, The Kansas City Star Company v. Shields*, 771 S.W.2d 101 (Mo.App. W.D. 1989) (held meeting of finance committee of the Kansas City council in the back room of a bar and grill to discuss the city's budget informally was a public meeting subject to the Sunshine Law); *but see, In Re Kansas City Star Co.*, 73 F.3d 191 (8<sup>th</sup> Cir. 1996) (Sunshine Law does not apply to official meeting of federal governmental bodies, even where state governmental bodies appear at such meetings for the purpose of federal concerns); *Kansas City Star v. Fulson*, 859 S.W.2d 934, 940 (Mo.App. W.D. 1993) (Sunshine Law does not apply to "social" gatherings or "informal" meetings of public governmental bodies in which public business not discussed).

### **2. Contrast: Closed Meeting.**

Any meeting, record, or vote closed to the public. Section 610.010(1), RSMo 2000.

### **3. Exception: Ministerial or Purely Social Meetings.**

A public meeting does not include an informal gathering of members of a public governmental body for ministerial or social purposes when there is no intent to avoid the requirements of the Sunshine Law. §610.010(5), RSMo (2000). *See, Colombo v. Buford*, 935 S.W.2d 690, 696 (Mo.App. W.D. 1996); *Kansas City Star Company v. Shields*, 771 S.W.2d 101 (Mo.App.W.D. 1989).

### **4. The "Daisy Chain".**

The definition of "public meeting" in the Sunshine Law is silent as to whether a meeting of a public governmental body may consist of less than a quorum of that body. *See, § 610.010(5), RSMo 2000.* It is not unusual for public governmental bodies to discuss public business *via* the "daisy chain." A few members of a public governmental body that do not themselves constitute a quorum may get together to discuss public business. A few more members may get together to do the same. Eventually, public business is effectively determined without a formal meeting of a quorum of the body.

In Attorney General Opinion No. 10, Schechter, 1975, the Attorney General considered the question of whether weekly luncheon meetings of the majority party members of the St. Louis County Council, at which council business was discussed,

were public meetings as defined in § 610.010(3). The Attorney General concluded that luncheon meetings of either the majority party members or of the minority party members of the St. Louis County Council, at which public business was discussed, were public meetings; *but see, Colombo v. Buford*, 935 S.W.2d 960, 697 (Mo.App. W.D. 1996) (series of one-on-one personal and telephonic discussions between members of school board relating to renewal of superintendent's contract was not a closed meeting).

#### **D. Public Record: § 610.010(6), RSMo 2000 & Supp. 2004.**

##### **1. General: Any record of a public governmental body or any record retained by a public governmental body.**

A public record is defined generally in the Sunshine Law to include any record retained by or of any public governmental body. Section 610.010(6), RSMo 2000. The emphasis is not on the nature of the document, but on whom prepared or retains it. *See, City of Springfield v. Events Publishing Co.*, 951 S.W.2d 366, 371 (Mo.App. S.D. 1997) (names and addresses of utility customers are public records unless customers request confidentiality).

The word "retain" is given its ordinary, dictionary meaning, which is "to hold or continue to hold in possession or use." *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 881 (Mo. banc 1999) (videotape of booking at a county jail is a public record even though the videotape is retained only for a few days).

##### **2. Physical Form of Records.**

The Sunshine Law applies to all public records, regardless of physical form. The Sunshine Law expressly provides that it includes both written and electronically stored (or "computerized") records. *Id. See, Deaton v. Kidd*, 932 S.W.2d 804, 806 (Mo.App.W.D. 1996) (state statutes maintained on computer constitutes a "public record" subject to the Sunshine Law).

##### **3. Consultant or Professional Records.**

A public record is also defined to include any report, survey, memorandum, document or study prepared and presented to a public governmental body by a consultant or other professional service paid for in whole or in part by public funds. This provision includes records created or maintained by private contractors under an agreement with a public governmental body or on behalf of a public governmental body.

##### **4. The "Daisy Chain"**

Any member of a public governmental body who transmits any message relating to public business by electronic means must also concurrently transmit that message to either the member's public office computer or the custodian of records. Section 610.025, RSMo 2000. This section applies only to messages sent to two or more members of that body so that, when counting the sender, a majority of the body's members are copied. Any message received by the custodian or member's office computer is a public record subject to the exceptions of Section 610.021, RSMo 2000 & Supp. 2004.

##### **5. Exception: Individually Identifiable Student Records.**

Personally identifiable student records maintained by public schools are excluded from the definition of public record and therefore not open to the general public. If a student is younger than 18 years old, such records are open for inspection only to that student's parents, guardian or other custodian. *Id.* If a student is 18 years or older, such records are also open for inspection to that student. *Id.*

##### **6. Exception: Advice, Opinions and Recommendations in connection with Decision-making Process.**

Internal memorandum or letters received or prepared by or on behalf of a public governmental body that consists of advice, opinions and recommendations in connection with the deliberative decision-making process are exempt, unless such records are retained by the body or presented at a public meeting.

#### **E. Public Vote: § 610.010(7), RSMo 2000.**

Any votes taken, whether conducted in person, by telephone, or by any other electronic means, cast at any meeting of any public governmental body is a public vote under the Sunshine Law. § 610.010(7), RSMo (2000 & Supp. 2004). Any votes taken during a closed meeting must be taken by roll call. §610.015, RSMo (2000).

## **10.4 EXCEPTIONS TO DISCLOSURE AND ACCESS REQUIREMENTS OF THE SUNSHINE LAW**

### **A. General Observations about Exceptions to the Sunshine Law.**

#### **1. Some exceptions to the disclosure and access requirements of the Sunshine Law are specifically enumerated in the Sunshine Law itself.**

A number of exceptions to the general rule of access provided in the Sunshine Law are specifically enumerated in the Sunshine Law. *See*, § 610.021, RSMo 2000. Other exceptions have been created by statute and “incorporated” into the Sunshine Law. *See*, discussion of “catch-all” exception, *supra*, §10.4.B.14 and C.

#### **2. Exceptions are to be strictly and narrowly construed.**

The access requirements of the Sunshine Law are to be liberally construed, and exceptions authorizing limitations on access are to be narrowly construed. Section 610.011.1, RSMo 2000. *See also*, *Tipton v. Barton*, 747 S.W.2d 325, 330 (Mo. App. E.D. 1988); *MacLachlan v. McNary*, 684 S.W.2d 534, 537 (Mo.App. E.D. 1984) (exceptions in the Sunshine Law are to be narrowly construed).

#### **3. Application of exceptions enumerated in the Sunshine Law is generally discretionary.**

Generally, application of the exceptions enumerated in the Sunshine Law is discretionary. Section 610.022.4, RSMo 2000 (“Nothing in §§ 610.010 to 610.028 shall be construed so as to require a public governmental body to hold a closed record.”).

#### **4. Mandatory Exceptions.**

Student records must be closed records pursuant to § 610.010(4), RSMo 2000.

Social Security numbers shall not be disclosed by any state entity pursuant to § 610.035, RSMo 2000.

#### **5. Generally, affirmative action to close a meeting or record within an exception to the Sunshine Law is required.**

Even if a statutory exception applies to a particular record, affirmative action is generally required by a public governmental body to close a record. Otherwise, the record must be made available for public inspection. Moreover, until a public governmental body follows the procedures set forth in the Sunshine Law to exercise its discretion and close otherwise public records under one of the enumerated exceptions, the public has a right to inspect those records. *Tipton v. Barton*, 747 S.W.2d 325, 330 (Mo.App. E.D. 1988) (the public governmental body with control over the records must affirmatively vote to close the records at a public meeting with notice and a reference to the exception upon which the body relies in closing the record). *But see*, § 610.032, RSMo 2000 (affirmative action not required to “close” records of executive agencies that are required to be closed by law).

#### **6. “Preliminary Drafts” of otherwise public records are not exempt from Sunshine Law.**

Unlike the federal Freedom of Information Act, 5 U.S.C. §§552, *et seq.*, the Sunshine Law does not automatically exempt preliminary drafts. *Missouri Protection and Advocacy Services v. Allan*, 787 S.W.2d 291, 292 (Mo.App. W.D. 1990) (held draft report of Federal Department of Education, provided to and retained by State Department of Elementary and Secondary Education, is as public record under the Sunshine Law). However, whether a “draft” at issue is a “record” that is “retained by or of” a public governmental body is a determination that must be made under particular facts and circumstances. For example, a document that is a “work in progress” that has not been presented to the public governmental body may not be a “record” that is “retained by or of” a public governmental body.

### **B. Exceptions enumerated in the Sunshine Law: § 610.021, RSMo 2000).**

#### **1. Litigation, Confidential Attorney-Client Communications: § 610.021(1), RSMo 2000.**

##### **a. Litigation and confidential attorney-client communications generally.**

Communications by a public governmental body about litigation to which it is a party, or confidential communications between a public governmental body and its attorney, may generally be closed.

Records relating to “legal actions, causes of action, or litigation involving a public governmental body.” Section 610.021(1), RSMo 2000. But any minutes, vote or settlement agreement relating to legal actions involving a public body

must be made public upon final disposition of the matter voted upon or upon the signing of a 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 to the action clearly outweighs the public policy considerations of the Sunshine Law. Notwithstanding the foregoing, the amount of moneys paid by or on behalf of the public body must be disclosed; and

\* “confidential or privileged communications between a public governmental body or its representatives and its attorneys” *Id.*; and

\* legal work product. *Id.*

*See, Librach v. Cooper*, 778 S.W.2d 351, 353-354 (Mo.App. E.D. 1989) (held settlement agreement between board of education and superintendent of school district was not a confidential or privileged communication between a public governmental body and its attorneys).

Mere reference to litigation is not sufficient to trigger this exception. *See, Tipton v. Barton*, 747 S.W.2d 325, 330 (Mo. App. E.D. 1988) (litigation exception applies to analytical work product, but not to general descriptions of legal services rendered appearing on city attorneys itemized monthly billing statements).

### **b. Exception removed upon final disposition of litigation.**

After final disposition of a litigation matter, any vote relating to that litigation involving a public governmental body must be made public. Section 610.021(1), RSMo 2000. Upon final disposition of litigation involving a public governmental body, the body must make public its minutes of closed meetings and its votes. Other confidential or privileged communications and legal work product may remain closed. Section 610.021(1), RSMo 2000. *See, Calvert v. Mehlville R-IX School District*, 44 S.W.3d 455 (Mo.App. E.D. 2001) (school district must make public its vote to approve a settlement agreement, therefore, teacher is not entitled to damage for breach of confidentiality provision in settlement agreement when the district disclosed existence of the agreement).

### **c. Eminent Domain/Condemnation.**

When a public governmental body is undertaking to exercise the power of eminent domain, the vote must be made public immediately following the action on the motion to authorize institution of a condemnation action. *Id.*

## **2. Real Estate: § 610.021(2), RSMo 2000.**

### **a. Scope of the Real Estate Exception.**

Government records relating to the leasing, purchase or sale of real estate by a public governmental body may be closed. *Id.* Such records, including minutes of closed meetings, may be closed even if no actual lease, purchase or sale of real estate results. *See, Birk v. City of Jackson*, 907 S.W.2d 181, 187 (Mo.App. E.D. 1995).

### **b. Must find adverse effect of public knowledge.**

Before a “real estate” record may be closed, the public governmental body must first find that public knowledge of the transaction might adversely affect the legal consideration for that real estate. Section 610.021(2), RSMo 2000; *Birk v. City of Jackson*, 907, S.W.2d 181, 187 (Mo.App. E.D. 1995).

### **c. Exception removed upon completion of transaction.**

Minutes of closed meetings, votes or other public records approving the contract relating to the leasing, purchase or sale of real estate by a public governmental body must be made public upon execution of the lease, purchase or sale of the real estate. Section 610.021(2), RSMo 2000.

*See, Birk v. City of Jackson*, 907 S.W.2d 181, 187 (Mo.App. E.D. 1995) (held city properly closed minutes of closed council meetings to discuss agreement with independent contractors to operate landfill owned by city until agreement was approved); *City of St. Louis v. City of Bridgeton*, 806 S.W.2d 717, 719 (Mo.App. E.D. 1991) (held that the meaning of the term “transaction” in the Real Estate exception is broad enough to encompass multi-lot bulk real estate acquisition or buyout program by public governmental body, and contracts on individual lots need not be available for public inspection until buyout program is complete and knowledge of purchase prices on individual lots would not adversely affect subsequent contracts); *Tipton v. Barton*, 747 S.W.2d 325, 331 (Mo.App. E.D. 1988) (mere reference in a public record to a real estate transaction is not sufficient to trigger application of the real estate exception; the exception applies only where the actual terms of any real estate transaction or a negotiating position of the public governmental body is reflected in the record).

### **3. Employment: § 610.021, RSMo 2000.**

#### **a. Individual personnel decisions and personal information closed.**

Government records relating to certain individual personnel decisions may be closed, provided personal information about the employee is discussed or recorded:

- \* hiring of an employee of a public governmental body;
- \* firing of an employee of a public governmental body;
- \* disciplining an employee of a public governmental body; and
- \* promoting an employee of a public governmental body

#### **b. Personal information about the employee.**

The above records may be closed only if personal information about the employee is discussed or recorded. "Personal" information is defined to include information relating to the performance or merit of individual employees.

#### **c. When information may be made public.**

Any vote on a final decision made by a public governmental body, to hire, fire, promote or discipline one of its employees must be made available with a record how each member voted to the public within 72 hours of the close of the meeting where such action occurs, provided, however, that the affected employee is entitled to prompt notice before such decision is made available to the public.

*See, Wolfskill v. Henderson*, 823 S.W.2d 112, 114 (Mo.App. W.D. 1991) (held police department internal investigative reports not subject to disclosure under the Sunshine Law); *Paskon v. Salem Memorial Hospital District*, 806 S.W.2d 417, 423-424 (Mo.App. W.D. 1991) (board of directors of hospital district could conduct closed meeting to discuss suspension of physician's hospital staff privileges); *Librach v. Cooper*, 778 S.W.2d 351 (Mo.App. E.D. 1989) (held records reflecting severance pay paid to former superintendent of public school district are public records subject to disclosure under the Sunshine Law); *Tipton v. Barton*, 747 S.W.2d 325, 331 (Mo.App. E.D. 1988) (mere identification of personnel matters within a description of legal services rendered on a city attorneys itemized monthly billing statement is not sufficient to place the statement within the employment exception); *Hudson v. School District of Kansas City*, 578 S.W.2d 301, 309 (Mo.App. W.D. 1979) (meeting in which school board decided to furlough several hundred probationary teachers and reassign a large number of administrative employees did not fall within the employment exception because the impelling motivation was financial. The Board was attempting to solve a huge budget deficit. The individual employees affected were not discussed).

### **4. State Militia or National Guard.**

Records relating to the state militia or National Guard may be closed. §610.021(4), RSMo (2000). There are no reported decisions relating to this exception. Any such record, even if it does not pertain to security, falls within this exception.

### **5. Non-Judicial Mental Health or Physical Health Proceedings.**

Records relating to non-judicial mental or physical health proceedings involving identifiable persons, including medical, psychiatric, psychological, or alcoholism or drug dependency diagnosis or treatment may be closed. §610.021(5), RSMo (2000).

### **6. Scholastic Records.**

Government records relating to scholastic probation, expulsion or graduation of identifiable individuals, including records of individual test or examination scores, may be closed. Section 610.021(6), RSMo 2000. However, personally identifiable student records maintained by public educational institutions are open for inspection by the parents, guardian or other custodian of a student under the age of 18 years and by the parents, guardian or other custodian and the student if the student is over the age of 18 years. *Id.*

### **7. Testing or Examination Materials.**

Testing and examination materials, before the test or examination is given or, if it is to be given again, before so given again, may be closed. Section 610.021(7), RSMo 2000.

### **8. Welfare.**

Government records relating to welfare cases of identifiable individuals may be closed. Section 610.021(8), RSMo 2000.

## **9. Public Employee Negotiations.**

Government records relating to preparation, including any discussions or work product, on behalf of a public governmental body or its representatives for negotiations with employee groups may be closed. Section 610.021(9), RSMo 2000. *See, State ex rel. Board of Public Utilities v. Crow*, 592 S.W.2d 285 (Mo.App. S.D. 1979) (collective bargaining sessions of city board of public utilities not required to be open to the public).

## **10. Computer Programs.**

Software codes for electronic data processing and documentation thereof may be closed. Section 610.021(10), RSMo 2000.

## **11. Specifications for Competitive Bidding.**

Specifications for competitive bidding, until either the specifications are officially approved by the public governmental body or the specifications are published for bid may be closed. Section 610.021(11), RSMo 2000.

## **12. Sealed Bids.**

Sealed bids and related documents, until the earlier of either when the bids are opened, or all bids are accepted or all bids are rejected, may be closed. Section 610.021(12), RSMo 2000.

## **13. Personnel Records.**

Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment may be closed. Section 610.021(13), RSMo 2000. *See, Librach v. Cooper*, 778 S.W.2d 351 (Mo.App. E.D. 1989) (held records reflecting severance pay paid to former superintendent of public school district are public records subject to disclosure under the Sunshine Law); *Wolfskill v. Henderson*, 823 S.W.2d 112, 114 (Mo.App. W.D. 1991) (held police department internal investigative reports not subject to disclosure under the Sunshine Law); *Wilson v. McNeal*, 575 S.W.2d 802, 806 (Mo.App. E.D. 1978) (record of police department of investigation into death of man in police custody could be a closed record); *Christiansen v. Missouri State Board of Accountancy*, 764 S.W.2d 943 (Mo.App. W.D. 1988) (held CPA was entitled to access to records of the State Board of Accountancy relating to disciplinary proceedings against him). This exception does not apply to the names, positions, salaries and lengths of services 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 present at all public colleges and universities and the amount of money contributed by the source. *Id.* Section 610.021(13), RSMo 2000 & Supp. 2004. There is likely to be some overlap between this § and the employment exception in § 610.021(3), RSMo 2000 & Supp. 2004.

## **14. The “Catch-All” Exception: Records That Are Protected From Disclosure by Law.**

### **a. Scope Generally.**

Records that are “protected from disclosure by law” may be closed. Section 610.021, RSMo 2000.

Therefore, in addition to the exceptions to the general rule of disclosure that are specifically enumerated in the Sunshine Law itself, other exceptions may be enacted in other statutes, and are “incorporated” into the Sunshine Law via the so-called “catch-all” exception.

### **b. “By Law” means by statute.**

The language in the “catch-all” exception, referring to records that are “protected by disclosure by law,” is limited to records that would otherwise be “public records” subject to public disclosure under the Sunshine Law that are rendered exempt by statute. *Oregon County R-IV School District v. LeMon*, 739 S.W.2d 553, 557 (Mo.App. W.D. 1987) (“The phrase ‘except as otherwise provided by law’ means except as otherwise provided by statute.[P]ublic records must be open for inspection and duplication unless a statute prohibits their disclosure”); *see also, State ex rel. Retirement System v. Bill*, 935 S.W.2d 659, 665 (Mo.App. W.D. 1996).

### **c. “By Law” does not mean by regulation.**

*See, Pulitzer Publishing Company v. Missouri State Employees’ Retirement System*, 927 S.W.2d 477, 480 (Mo.App. W.D. 1996) (held MOSERS exceeded its statutory authority by enacting regulation purporting to close certain pension records that were not closed by statute).

**d. "By law" does not mean by Federal law or regulation.**

The federal Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552, *et seq.*, does not apply to state governmental entities. FOIA only applies to federal agencies, and does not create exceptions to the disclosure and access requirements of Missouri's Sunshine Law. *See, Missouri Protection and Advocacy Services v. Allan*, 787 S.W.2d 291, 292 (Mo.App. W.D. 1990) (a record exempt from FOIA is not exempt from the Missouri Sunshine Law unless a specific state statute expressly so provides).

*See, Oregon County R-IV School District v. LeMon*, 739 S.W.2d 553, 557 (Mo.App. S.D. 1987) (language in the Sunshine Law "except as otherwise provided by law" means except as otherwise provided by statute).

**15. Scientific/Technological Innovations.**

Records relating to scientific and technological innovations in which the owner has a proprietary interest may be closed. Section 610.021(15), RSMo 2000.

**16. Municipal Hot Lines.**

Records relating to municipal hot lines established for the reporting of abuse and wrongdoing.

**17. Communications between Governmental Body and Auditor.**

Confidential or privileged communications between a public governmental body and its auditor, including all auditor work product, are protected from disclosure, however, all final audio reports issued by the auditor are considered open records. Section 610.021(15), RSMo 2000.

**18. Operational Guidelines and Policies of Public Agencies' Response for Public Safety.**

Operational guidelines and policies developed, adopted or maintained by a public agency responsible for law enforcement, public safety, first response, or public health for use in responding to or preventing any critical incident that is or appears to be terrorist in nature and which has the potential to endanger individual or public safety or health is protected from disclosure. Section 610.021(18), RSMo 2000 & Supp. 2004.

Notwithstanding the foregoing, information regarding expenditures, purchases or contracts made by an agency implementing emergency guidelines or polices shall be open to inspection. *Id.*

When seeking to close information pursuant to this exception, the agency must affirmatively state in writing that disclosure would impair its ability to protect the safety or health of persons and must state that the public interest in nondisclosure outweighs the public interest in disclosure of the records. (This exception expires on December 31, 2008).

**19. Security Systems and Structural Plans.**

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 non-public 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, are closed records. Section 610.021(19), RSMo 2000 & Supp. 2004.

Notwithstanding the foregoing, records related to the procurement or expenditures relating to security systems purchased with public funds are open. *Id.*

When seeking to close information pursuant to this exception, the public governmental body must state in writing that disclosure would impair the public body's ability to protect the security or safety of persons or real property, and must further state that public interest in nondisclosure outweighs the public interest in disclosure.

Records that are voluntarily submitted by a nonpublic entity shall be reviewed by the receiving agency within 90 days of submission to determine if retention of the document is necessary in furtherance of a state security interest. (This Section expires on December 31, 2008).

**20. Computer Configurations or Operations.**

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. Section 610.021(20), RSMo 2000 & Supp. 2004.

This exception shall not be used to limit or deny access to otherwise public records in a file, document, date file or database containing public records. In addition, records related to the procurement of or expenditures relating to such computer system shall be open. *Id.*

## **21. Credit Card Numbers and Personal Identification Numbers.**

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 body and a person or entity doing business with it. This provision does not close the record of a person or entity using a credit card held in the name of a public body or any record of a transaction made by a person using a credit card for which reimbursement is made by the public body. Section 610.021(21), RSMo 2000 & Supp. 2004.

## **C. Particular Exceptions Incorporated Into The Sunshine Law Via “Catch-All” Exception.**

### **1. Law Enforcement Records.**

#### **a. Definitions.**

The Arrest Records Law, §§ 610.100 *et seq.*, RSMo 2000, distinguishes between arrest, incident and investigation reports of law enforcement agencies.

#### **(1) Arrest Reports.**

Records of an arrest and of any detention or confinement incident to an arrest. Section 610.100.1(2), RSMo 2000.

#### **(2) Incident Reports.**

Immediate facts and circumstances surrounding the initial report of a crime or incident, including any logs of reported crimes, accidents and complaints maintained by the law enforcement agency. Section 610.100.1(4), RSMo 2000.

#### **(3) Investigation Reports.**

Reports other than arrest reports or incident reports that are prepared by a law enforcement agency inquiring into a crime or suspected crime, either in response to an incident report or to evidence developed by law enforcement officers in the course of their duties. Section 610.100.1(5), RSMo 2000.

### **b. Access to Arrest Records and Incident Reports.**

#### **(1) Generally, Arrest Records And Incident Reports Are Public Records.**

Generally, all arrest reports and incident reports are public records. Section 610.100.2, RSMo 2000. See, *Guyer v. City of Kirkwood*, 38 S.W.3d 412, 414-15 (Mo. banc 2001) (a complaint alleging criminal misconduct by a police officer is an “incident report” and report concerning investigation into the complaint is an “investigative report” under § 610.100).

#### **(2) 30-Day Rule: Arrest Records and Incident Reports Closed if No Charges.**

If a person who is arrest is not charged with an offense within thirty days, official records of the arrest and of any confinement incidental to that arrest become closed records. Section 610.100.2, RSMo 2000.

#### **(3) Nolle Pross; Dismissal; Finding of Not Guilty or Guilty but With SIS: Arrest Records, Incident Reports, And Records of Criminal Proceedings Become Closed.**

If a person who is arrested and charged, but the charge is later *nolle prossed* or dismissed, or the person is either found not guilty or received a suspended imposition of his sentence (“SIS”), records of the arrest and the criminal proceedings become closed records, except as provided in § 610.120 and except that the court’s judgment or order or the prosecutor’s final action may be accessed. Section 610.105, RSMo 2000 & Supp. 2004.

If the accused is found not guilty due to mental disease or defect, official records shall be closed, except the disposition may be accessed by law enforcement agencies, child care agencies and in-home services provider agencies. Section 610.105, RSMo 2000 & Supp. 2004.

### **c. Access To Investigation Reports.**

#### **(1) Investigation Reports Generally Closed Until “Inactive.”**

Investigation reports are closed records until the investigation becomes “inactive.” Section 610.105, RSMo 2000. The term “inactive” is defined to include a decision by a law enforcement agency not to pursue a case, the expiration of the applicable statute of limitations, or the finality of convictions and exhaustion of all appeals. §610.100.1(3), RSMo (2000).

*See, News-Press and Gazette Co. v. Cathcart*, 974 S.W.2d 576, 580 (Mo.App. W.D. 1998) (autopsy report is an investigative report and should be closed pursuant to § 610.100).

**(2) Authorization For Lawsuits Seeking Access To Information In Investigative Reports.**

Any person may file suit in a Missouri circuit court seeking disclosure of information contained in an investigative report that otherwise would be a closed record. The circuit court may examine the investigative report “in camera” and is to consider whether the benefit to the person bringing the action outweighs any harm to the public, the law enforcement agency or officers, or any person identified in the investigative report. The court may order the person filing the lawsuit to pay the costs and attorneys fees of *both* parties. Section 610.100.5 RSMo 2000.

**d. Access To Daily Logs.**

Local law enforcement agencies that maintain a daily log or record that lists suspected crimes, accidents, or complaints are required to make certain limited information available to the public, including the time, substance and location of all complaints or requests for assistance, the time and nature of the agency’s response, information relating to the underlying occurrence, the identity of certain victims, and a general description of the injuries, property or weapons involved. Section 610.200, RSMo 2000.

**e. Access To “911” Reports.**

Information acquired by a law enforcement agency *via* “911” telephone reports are not available to the public. Section 610.150, RSMo 2000.

**f. Discretion to Withhold Police Records.**

**(1) “Clear And Present Danger”.**

Law enforcement agencies are afforded discretion to withhold arrest, incident, or other reports or records if they contain information that is “reasonably likely to pose a clear and present danger to the safety of any victim, witness, undercover officer or other person.” Section 610.100.3, RSMo 2000.

**(2) “Jeopardy to A Criminal Investigation”.**

Law enforcement agencies may withhold otherwise public records if disclosure would “jeopardize a criminal investigation”. Section 610.100.3, RSMo 2000.

**(3) Disclosure of the Identity of A Source Wishing to Remain Confidential.**

Law enforcement agencies may withhold otherwise public records if disclosure would reveal the identity of a source wishing to remain confidential. Section 610.100.3, RSMo 2000 & Supp. 2004

**(4) Disclosure Of The Identity Of A Suspect Not In Custody.**

Law enforcement agencies may withhold otherwise public records if disclosure would reveal the identity of a suspect not in custody. Section 610.100.3, RSMo 2000.

*See, State ex rel. DeGarrenried v. Keet*, 619 S.W.2d 873 (Mo.App. S.D. 1981) (held “summons” does not constitute an “arrest”, and that §610.105 does not shield such records); *Charlier v. Corum*, 794 S.W.2d 676 (Mo.App. W.D. 1990) (inmate records retained by sheriff are public records subject to disclosure).

**2. Other Records Closed By Statute And Incorporated Into The Sunshine Law Via “Catch-All” Exception.**

Contact author directly for tables identifying numerous statutes creating additional “exceptions” to the rule of public access and disclosure.

**3. Judicial Procedure to Open Records and Civil Penalties.**

Any person may apply to the circuit court for an order requiring a law enforcement agency to open incident reports and arrest reports being unlawfully closed. If the court finds by a preponderance of the evidence that the law enforcement officer or agency has knowingly violated the Sunshine Law, the officer or agency is subject to a civil penalty of no more than \$1,000, and the court may order payment by the officer or agency of all costs and attorney fees. Section 610.027.3, RSMo 2000 & Supp. 2004.

If the court finds by a preponderance of the evidence that the law enforcement officer or agency purposely violated the Sunshine Law, the officer or agency is subject to a civil penalty of no more than \$5,000, and the court must order payment by such officer or agency of all costs and attorney fees. Section 610.027.4, RSMo 2000 & Supp. 2004.

## **10.5 PROCEDURAL REQUIREMENTS OF THE SUNSHINE LAW**

### **A. Meetings.**

#### **1. Procedural Requirements for Public Meetings.**

##### **a. Reasonable Notice Required.**

Public governmental bodies must give notice of all meetings. Section 610.020, RSMo(2000).

##### **(1) Contents of Notice.**

Such notice must include the following:

- (i) the time,
- (ii) the date,
- (iii) the place, and
- (iv) a tentative agenda for the meeting reasonably calculated to apprise public of that information.
- (v) if the meeting will be conducted by telephone or other electronic means, the notice must identify the mode and the designated location where the public may observe and attend the meeting.

*Id.*

##### **(2) Manner of Delivery of Notice.**

##### **(a) News Media.**

Copies of the notice are to be made available to any representative of the news media who requests notice of a particular class of meetings. Section 610.020.1, RSMo 2000.

##### **(b) Posting of Notice.**

The notice must be posted on a bulletin board or other prominent place which is easily accessible to the public and clearly designated for that purpose at the principal office of the public governmental body holding the meeting or, if there is no such office, at the building in which the meeting is to be held. Section 610.020.1, RSMo 2000.

If the meeting will be conducted by telephone or other electronic means, the notice of the meeting must identify the mode by which the meeting will be conducted and the designated location where the public may observe and attend the meeting. Section 610.020.1, RSMo 2000 & Supp. 2004.

If the meeting is to be conducted by Internet chat, Internet message board, or other computer link, the public governmental body must post a notice of the meeting on its website in addition to its principal office and must notify the public how to access the meeting. Section 610.020.1, RSMo 2000 & Supp. 2004.

##### **(c) Time for Notice. General Rule: 24 Hours.**

Notice of a meeting is to be given *at least* 24 hours prior to the commencement of that meeting. The 24-hour period is to *exclude* weekends and holidays when the facility is closed. Section 610.020.2, RSMo 2000.

##### **(d) Exception: All Reasonably Possible Notice**

Where, for good cause shown, 24-hour notice is impossible or impractical, as much notice as is reasonably possible is to be given. *Id.* When less than 24 hours notice is given, however, the minutes of that meeting are to state the nature of the good cause justifying departure from the 24 hour notice rule. *Id. See, Birk v. City of Jackson*, 907 S.W.2d 181, 188 (Mo.App. E.D. 1995) (affirmed trial court's determination that it was impractical to add discussion of contract to city council agenda when contract came in on afternoon of meeting, and the agenda had been previously printed).

**b. Time for Meetings.**

Meetings of a public governmental body must be held at a time reasonably convenient to the public, unless for good cause shown such a time is impossible or impractical. Section 610.020.2, RSMo 2000. If a meeting is to be held at a time not reasonably convenient to the public, the minutes are to state the nature of the good cause justifying departure from that requirement. Section 610.020.4, RSMo 2000.

**c. Place for Meetings.**

**(1) Reasonable Access to the Public.**

Meetings are to held at a place reasonably accessible to the public and of sufficient size to accommodate the anticipated public attendance, unless for good cause shown such a place or time is impossible and impractical. Section 610.020.2, RSMo 2000 & Supp. 2004. If a meeting is held in a place not reasonably accessible to the public, the minutes of the meeting are to state the nature of the good cause justifying departure from that requirement. Section 610.020.3, RSMo 2000 & Supp. 2004.

**(2) Special Access to Handicapped or Disabled Persons.**

Every reasonable effort is to made to grant special access to handicapped or disabled persons. Section 610.020.2, RSMo 2000 & Supp. 2004.

**(3) Meetings Conducted by Phone.**

At any meeting conducted by phone or other electronic means, the public must be allowed to attend at a designated location identified in the meeting notice. Section 610.020.1, RSMo 2000 & Supp. 2004.

**d. Recording by Audiotape, Videotape or Other Electronic Means.**

A public body must allow for the recording by audiotape, videotape or other electronic means of nay open meeting. A public body may establish guidelines regarding the manner in which such recording is conducted so as to minimize disruption to the meeting. No audio recording of any meeting, record or vote closed is permitted without permission of the public body. Any person who violates this provision is guilty of a class C misdemeanor. Section 610.020.2, RSMo 2000 & Supp. 2004.

**e. Procedural Requirements for Meetings of a Formally Constituted Subunit of a Parent Governmental Body.**

A formally constituted subunit of a parent governmental body may conduct a meeting without notice under the following conditions:

- (i) the subunit meets during a lawful meeting of the parent, during a recess in that meeting, or immediately following that meeting;
  - (ii) the meeting of the subunit is publicly announced at the meeting of the parent; and
  - (iii) the subject of the meeting of the subunit reasonably coincides with the subjects discussed or acted upon by the parent.
- Section 610.020.5, RSMo 2000.

**f. Minutes Required.**

A journal or minutes of open and closed meetings must be taken and retained by public governmental bodies. Section 610.020.7, RSMo 2000 & Supp. 2004. At a minimum, the minutes must contain the following information:

- \* Date of meeting;
- \* Time of meeting;
- \* Place of meeting;
- \* Members present and absent; and
- \* A record of any votes taken. If a roll call vote is taken, the minutes must attribute each “yea” and “nay” vote or abstinence if not voting to individual members of the public governmental body.

*Id.*

**g. Videotaping of public meetings.**

The Sunshine Law provides that a public body must allow for the recording by audiotape, videotape or other electronic means of any open meeting. The public body may establish guidelines to minimize disruption to the meeting. No audio recording of any closed meeting, record or vote is permitted without permission of the public body. Any person who violates this provision is guilty of a class C misdemeanor. Section 610.020.3, RSMo 2000 & Supp. 2004.

**2. Procedural Requirements for Closed Meetings or Votes: Section 610.022, RSMo 2000.**

**a. Vote to Close Meeting Required.**

No meeting or vote may be closed without an affirmative public vote of the majority of a quorum of the public governmental body. Section 610.022.1, RSMo 2000.

**(1) Roll Call Vote.**

The vote of each member of a public governmental body on the question of closing a public meeting or vote is to be announced publicly at an open meeting and entered into the minutes. Section 610.022.1, RSMo 2000. Any votes taken during a closed meeting must be taken by roll call. Section 610.015, RSMo 2000 & Supp. 2004.

**(2) Statement of Specific Reason for Closure.**

Reference to a specific section of the Sunshine Law authorizing the closed meeting is to be announced publicly and entered into the minutes. Section 610.022.1, RSMo 2000 & Supp. 2004. Such notice must comply with the notice procedures set forth in § 610.020 RSMo 2000 & Supp. 2004.

**(3) Objection of Member to Closed Meeting.**

If any member of a public body makes a motion to close a meeting, record or vote, and any other members believes that the motion, if passed, would cause a closure of the meeting, record or vote in violation of the Sunshine Law, the dissenting member must state his objection to the motion at or before the time of the vote. The public body must enter in the minutes any objection. Any objecting member must be allowed to participate in any meeting, record or vote that is closed. If the objecting member also voted in opposition to the motion to close the meeting, record or vote, the objection and vote of the member entered in the minutes shall be an absolute defense to any claim filed against the objecting member pursuant to § 610.027. Section 610.022.1, RSMo 2000 Supp. & 2004.

**(4) Meeting Closed Even Where Certain Members of Public Present**

A public governmental body may close a meeting to obtain information even where a significant number of the public is present in the meeting to provide that information. *See, Smith v. Sheriff*, 982 S.W.2d 775, 779 (Mo. App. E.D. 1998) (school board did not violate Sunshine Law when it allowed 48 members of public to attend a closed meeting to provide information involving rehiring of controversial teacher); *but see*, Attorney General Opinion No. 18-81 (public governmental body may not arbitrarily discriminate in admitting members of the public in to a closed meeting).

**b. Notice of a Closed Meeting Required.**

**(1) Compliance with Procedures for Public Meetings.**

A public governmental body proposing to hold a closed meeting or vote shall comply with the notice requirements for public meetings set forth above. Section 610.022, RSMo 2000.

**(2) Reference to Specific Exception.**

Notice of a closed meeting must also refer to one of the specific exceptions authorizing closure enumerated in the Sunshine Law. *Id.*

**c. Scope of Closed Meetings.**

Any meeting or vote may be closed only to the extent necessary for the specific reason announced to justify the closed meeting or vote. No business that does not directly relate to the specifically announced reason for the closed meeting or vote may be discussed.

**d. Close Only Portion of Meeting Facility.**

A public body holding a closed meeting should only close a portion of the meeting facility necessary to house the

closed session, allowing the public to remain to attend any subsequent open session.

## **B. Records.**

### **1. Procedural Requirements for Public Records. Section 610.023-.026, RSMo 2000.**

#### **a. Records to be Made Available to the Public.**

##### **(1) Generally.**

Each public governmental body is to make its records available for inspection and copying to the public. Section 610.023.2, RSMo 2000 & Supp. 2004. Original public records are not to be removed from the office of the public governmental body or its custodian of records. *Id.* A public governmental body is only obligated to copy public records if duplicating equipment is available. *See*, § 610.010(2), RSMo 2000.

##### **(2) Format.**

If records are requested in a certain format, the public body must provide the records in the requested format, if available. Section 610.023.3, RSMo 2000 & Supp. 2004.

##### **(3) Written Policy Required.**

Each public governmental body is to provide a reasonable written policy regarding the release of information on any meeting, record or vote. Section 610.028.2, RSMo 2000. That policy is also to be open for public inspection. *Id.*

##### **(4) Messages sent by Electronic Means.**

If a member of a public entity transmits any message relating to public business by electronic means, he must also transmit that message to either the member's public office computer or the custodian of records in the same format. This provision applies only to messages sent to two or more members of that body so that, when counting the sender, a majority of the body's members are copies.

##### **(5) Electronic Services.**

A public governmental body may provide electronic services involving public records to the public, and is strongly encouraged to make information available in usable electronic formats to the greatest extent feasible. Section 610.029, RSMo 2000. However, providing such electronic services may not take priority over the primary responsibilities of the public governmental body. *Id.* A public body may not contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of that agency. *Id.*

#### **b. Designing Public Records.**

When designing a public record, a public governmental body must, if practicable, facilitate the separation of exempt from nonexempt information. Section 610.024.2, RSMo 2000.

#### **c. Custodian of Records.**

Each public governmental body is to appoint a custodian of records who is to be responsible for the maintenance of that body's records. Section 610.023.1, RSMo 2000. The identity and location of the custodian of records is to be made available upon request. *Id.*

#### **d. Form of Request for Access to Records.**

Requests for access to public records may be oral or written. Requests should sufficiently identify the records sought. *See, Anderson v. Village of Jacksonville*, 103 S.W.3d 190, 197 (Mo.App.W.D. 2003). Except for the most routine requests, written requests are advisable.

#### **e. Time Limits for Responding to a Record Request.**

##### **(1) Generally: Less Than Three Business Days.**

Each request is to be acted on as soon as possible, but in no event later than the third business day following the date the custodian of records receives the request. Section 610.023.3, RSMo 2000.

**(2) Exception: More Than Three Business Days for Reasonable Cause.**

The period for production of a requested document for inspection may exceed three business days for reasonable cause. Section 610.023.3, RSMo 2000. If access to a requested public record is not granted immediately, the custodian of records is to provide:

- (i) a detailed explanation of the cause for delay; and
- (ii) the earliest date and time that the record can be made available. *Id.*

**f. Fees For Copying Public Records. §610.026, RSMo (2000).**

**(1) General Rule: Ten Cents Per Page.**

The Sunshine Law provides that copying fees shall not exceed ten cents per page for a paper not larger than nine by fourteen inches. Section 610.026(1), RSMo 2000 & Supp. 2004.

**(2) Particular Fee Specifications.**

**(a) Search.**

Research time required for fulfilling the records request may be charged at the actual cost of research time. Based on the scope of the request, the public body must produce the copies using employees of the body that result in the lowest amount of charges for search, research and copying time. *Id.*

**(b) Duplication.**

The hourly fee for duplicating time not to exceed the average hourly rate of pay for the public body's clerical staff. Prior to producing copies, the person making the request may ask the public body to provide an estimate of the cost of copying the records. *Id.*

**(c) Computer Records.**

Fees for providing access to public records maintained on computer facilities, recording tapes or disks, video tapes or films, pictures, maps, slides, graphics, illustrations or similar audio or visual items or devices, and for paper copies larger than nine by fourteen inches should include only the cost of copies and staff time required for making copies. The cost of staff time should not exceed the average hourly rate of pay for staff of the public body making the copies and programming, and the cost of the disk, tape or other medium used for the duplication. Section 610.026(2), RSMo 2000 & Supp. 2004. If programming is required beyond the usual level to comply with the request, the fees for compliance may include the actual costs of such programming. *Id.*

**(d) Maps, Blueprints and Plats.**

Fees for maps, blueprints or plats that require special expertise to duplicate may include the actual rate of compensation for the trained personnel required to duplicate such documents.

**(e) Estimate of Fees.**

Prior to producing copies of their requested records, the person requesting the records may request the public body to provide an estimate of the cost to the requesting party. Section 610.026(1), RSMo 2000 & Supp. 2004.

**(3) Waiver of Fees.**

Records may be furnished at no cost or at a reduced charge if the public governmental body determines such waiver or reduction of the fee is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the public governmental body and it is not primarily in the commercial interest of the requester. Section 610.026.1(1), RSMo 2000.

**(4) Advance Payment of Fees.**

Payment of fees for document search or duplication may be required by a public governmental body prior to the making of copies. Section 610.026.1(1), RSMo 2000.

## **2. Procedural Requirements for Closed Records.**

### **a. Written Statement of Grounds for Closure.**

If a request for access to a record retained by a public governmental body is denied, a written statement of the grounds for denial is to be provided *upon request*. Section 610.023.4, RSMo 2000. Although the Sunshine Law does not require that such a request be written, a written request is advisable. Such a statement of the grounds for denial of access to a record should cite the specific provision of law authorizing denial. *Id.*

### **b. Three Business Day Rule.**

Such a written statement of the grounds for denial of access to a record is to be furnished within three business days following the date the request is received. *Id.*

### **c. Scope of Closed Record.**

A record retained by or of a public governmental body may be closed only to the extent it relates to an enumerated exception. Section 610.021, RSMo 2000.

### **d. Redaction required.**

If a public record contains both exempt and nonexempt information, the public governmental body must separate the exempt from the nonexempt information, and make the nonexempt information available to the public for examination and copying. Section 610.024.1, RSMo 2000. If a public governmental body provides public records from which information purported to be exempt has been redacted, it must generally describe the information redacted unless that description would reveal the contents of the exempt information and thus defeat the purpose of the exemption. *Id.*

### **e. Action to Close a Record Generally Required.**

Even if a statutory exception authorizes closure of a public record, a public governmental body must take affirmative action to close a record. If a request for access is made prior to any action taken by a public governmental body to close that record, access must be given. *See, e.g., Tipton v. Barton, 757 S.W.2d 325 (Mo.App. E.D. 1988). But see, § 610.032, RSMo 2000.*

### **f. Disclosure of Closed Records by Executive Agencies.**

#### **(1) Executive Agency defined.**

An executive agency is defined to include any administrative entity created by constitution or state statute under the executive branch of government. Section 610.032.5, RSMo 2000. It includes any department, agency, board, bureau, council, commission, committee, board of regents or board of curators of public colleges and universities, any subdivision of an executive agency, or any “legally designated” agent of an executive agency.

#### **(2) Disclosure of closed record containing identifying information of individual persons by executive agency generally prohibited.**

Generally, if records retained by or of an executive agency are “closed by law,” that executive agency cannot disclose public records in a form that would allow identification of individual persons.

#### **(3) Disclosure of closed records without identifying information on individual persons not prohibited.**

The statute does expressly prohibit disclosure of all closed records. It prohibits such disclosure only where the records are “closed by law” (as opposed to records closed by exercise of discretion with respect to the exceptions enumerated in §610.021) and further, where such closed records contain identifying information on individuals.

#### **(4) Disclosure among executive agencies.**

Information from records “closed by law” may be exchanged among executive agencies under certain circumstances. Section 610.032, RSMo 2000.

**C. Votes: §610.015, RSMo (2000).**

Any vote cast at any public meeting of a public governmental body must be recorded. If a roll call vote is taken, a record must be kept of which individual members voted yea, which members voted nay, and which members abstained. *Id.* Public votes and records of public votes are to be open to the public. *Id.*

**D. Roll Call Votes of Elected Members, Excluding the Missouri General Assembly.**

All votes taken by roll call in meetings of a public body made of up elected members, except for the Missouri General Assembly and any committee established by a public governmental body, must be cast by members of the public governmental body who are physically present at the meeting.

In an emergency, votes may be taken by roll call with a quorum of the members physically present and less than a quorum participating via telephone, facsimile, Internet, or any other voice or electronic means. If so, such votes taken shall be regarded as if all members were physically present at the meeting. *Id.*, § 610.015, RSMo 2000 & Supp. 2004. The emergency justifying the departure from normal requirements must be stated in the minutes. *Id.*

**10.6 REMEDIES: JUDICIAL ENFORCEMENT OF THE SUNSHINE LAW**

**A. Standing.**

Any aggrieved person, taxpayer, or citizen of the state of Missouri, the Attorney General or prosecuting attorney, has standing to seek judicial enforcement of the Sunshine Law. Section 610.027.1, RSMo 2000.

**B. Mootness.**

A suit for judicial enforcement of the Sunshine Law must present a justiciable controversy. *See, Fulson v. Kansas City Star Co.*, 816 S.W.2d 297, 299 (Mo.App.W.D. 1991) (case must present specific factual matrix for declaratory judgment; court will not render abstract declarations of law). Without a justiciable controversy, a court lacks jurisdiction to enter a declaratory judgment. *Id.* at 300. If a public governmental body produces public records at issue in a suit for judicial enforcement of the Sunshine Law, and the plaintiff has not pleaded a purposeful violation of the Sunshine Law, the suit may be dismissed as moot. *See, Buckner v. Burnett*, 908 S.W.2d 908 (Mo.App.W.D. 1995).

**C. Venue.**

Suits to enforce the Sunshine Law are to be brought in the county in which the public governmental body has its principal place of business. *Id.*

**D. Statute of Limitations.**

Suits for enforcement of the Sunshine Law must be brought within one year from the date the violation is ascertainable. Section 610.027.5, RSMo 2000. Regardless of the date on which the violation became ascertainable, suit must be brought within two years of the violation. *Id.*

**E. Burden of Persuasion.**

Once the party seeking judicial enforcement of the Sunshine Law proves that the body in question is a public governmental body and, therefore subject to the Sunshine Law, and that it held a closed meeting, record or vote, the burden of persuasion shifts to the public governmental body and its members to demonstrate compliance with the Sunshine Law. Section 610.027.2, RSMo 2000. It is therefore incumbent upon the public governmental body and its members to establish that (i) an exception applies; (ii) that the procedures were followed to properly close the meeting, record or vote; and (iii) the meeting, record or vote was closed only to the extent specifically authorized by statute.

**F. Maintenance of Records after Suit Filed.**

After service of a summons, petition, complaint, counterclaim or cross-claim in an action to enforce the Sunshine Law, the custodian of the public record that is subject of the suit must not transfer custody or destroy the public record sought. Section 610.027.1, RSMo 2000 & Supp. 2004.

## **G. Remedies.**

### **1. Declaratory Judgment and Other Equitable Relief.**

The court may issue a declaratory judgment holding that the public governmental body violated the Sunshine Law, and issue an injunction prohibiting further violations. However, the court may only enter a declaratory judgment in the context of a specific factual matrix and actual justiciable controversy. *See, Fulson v. Kansas City Star*, 816 S.W.2d 297, 299 (Mo. App. W.D. 1991); *Buckner v. Burnett*, 908 S.W.2d 908 (Mo.App.W.D. 1995).

Typically in a suit for judicial enforcement of the Sunshine Law in which a public governmental body is determined to have violated the statute, a court will enter an injunction compelling compliance both as to past violations (i.e., require that a public record be made available for public inspection) and future violations (i.e., require that similar public meetings or records be open to the public in the future). However, in *Buckner v. Burnett*, *supra*, the Missouri Court of Appeals for the Western District, held the Sunshine Law does not provide a remedy in the nature of an injunction relating to future requests. Rather, the Sunshine Law merely provides a remedy for past violations. *Id.* In the event a public governmental body repeats the same violation, that new violation could be deemed a purposeful violation of the Sunshine Law, affording the additional relief discussed below. *Id.*

### **2. Civil Penalties, Attorneys Fees and Costs.**

#### **A. Knowing Violations.**

Where a court finds by a preponderance of evidence that a public governmental body or its member has **knowingly** violated the Sunshine Law, the public body or its member is subject to a civil penalty of no more than \$1,000. The court must determine the penalty by considering the size of the jurisdiction, the seriousness of the offense, and whether the public body or its members has previously violated the Sunshine Law. Section 610.027.3, RSMo 2000 & Supp. 2004.

If the court finds that there is a knowing violation of the law, the court may order the payment of all costs and reasonable attorney fees. *Id.*

#### **B. Purposeful Violations.**

Where a court finds by a preponderance of the evidence that a public body or its member has **purposely** violated the Sunshine Law, the public body or its member is subject to a civil penalty of no more than \$5,000. The court may further order the payment of costs and attorneys fees to the successful party establishing the violation. The court will determine the amount of the penalty by considering the size of the jurisdiction, the seriousness of the offense, and whether the public body or its member has previously violated the Sunshine Law. Section 610.027.4, RSMo 2000 & Supp. 2004. *See, State ex rel. Moore v. Brewster*, 116 S.W.3d 630, 634 (Mo.App. E.D. 2003) (award of attorneys fees against school board upheld where evidence supported fining that board purposely violated the Sunshine Law by failing to appoint a custodian of records); *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. banc 1998) (to purposely violate the Sunshine Law 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”).

#### **C. Attorney Fees of Opponent.**

A public governmental body should pay the attorney fees of its opponent when the body brings a declaratory judgment action pursuant to § 610.027.5, RSMo 2000 & Supp. 2004. *See, Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 883 (Mo. banc 1999) (public body that brings an action under § 610.027.5 to determine its responsibility under the Sunshine Law is liable for attorney fees because the body brings suit at its own expense under that section); *City of Springfield v. Events Publishing Co.*, 951 S.W.2d 366, 374 (Mo.App. S.D. 1997) (where public governmental body seeks judgment declaring whether a record is open or closed, the body must pay both its own costs of bringing the action and the respondent’s attorney fees).

### **3. Voiding of Action.**

Where a court finds by a preponderance of the evidence that a public governmental body has violated the Sunshine Law and that, under the facts of a particular case, the public interest in enforcement of the Sunshine Law outweighs the public interest in sustaining the validity of any action taken in a closed meeting, record or vote, the court is to void the action. Section 610.027.5, RSMo 2000. *See, R.E.J., Inc. v. City of Sikeston*, 2004 WL 1977716, (Mo. banc 2004) (city’s repeal of zoning ordinance, which was challenged by owner of land adjoining proposed development, did not render moot the landowner’s declaratory judgment action that sought declaration that ordinance was void due to Sunshine Law violations); *SSM Health Care v. Mo. Health Facilities Review Committee*, 2000 Mo.App.LEXIS 700 (Mo.App. W.D. February 15,

2000) (held agency vote would not be voided where agency could only reach the same result if there were a new vote); *State ex rel. Page v. Reorganized School District R-VI of Christian County*, 765 S.W.2d 317, 322 (Mo.App. S.D. 1989) (held that school board violated Sunshine Law when it conducted meetings between committee and two lowest bidders on construction project, but that board's award of contract to second lowest bidder would not be voided); *Hawkins v. City of Fayette*, 604 S.W.2d 716, 723-725 (Mo.App. W.D. 1980) (held special meeting of board of aldermen called by mayor to discuss his additional compensation without notice to public violated Sunshine Law, but was not basis for rendering ordinance subsequently enacted void).

#### **4. Members of Public Governmental Body Not Individually Liable for Expenditures Authorized During Unlawful Closed Meeting.**

Absent any statute imposing personal liability on the part of members of a public governmental body for expenditures authorized during an unlawfully closed meeting, a court has no jurisdiction to impose such remedies for violations of the Sunshine Law. *Champ v. Poelker*, 755 S.W.2d 383, 392 (Mo.App. E.D. 1988).

#### **G. Legal Defense of Members of the Public Governmental Body.**

A public governmental body may provide for the legal defense of any member charged with the violation of the Sunshine Law. Section 610.028.1, RSMo 2000.

### **10.7 DECLARATORY JUDGMENT ACTIONS BY PUBLIC GOVERNMENTAL BODIES**

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. Section 610.207.5, RSMo 2000. However, such a declaratory judgment action must involve specific documents that the public governmental body has in fact been requested to disclose to the public, as opposed to records that might be, but have not as yet been, requested. *See, Fulson v. Kansas City Star Company*, 816 S.W.2d 297, 299-300 (Mo.App. W.D. 1991).

### **10.8 CONTRAST: THE PUBLIC RECORDS LAW: §§ 109.180-190, RSMO (2000)**

#### **A. Overview.**

The Public Records Law requires that all state, county and municipal records kept pursuant to statute or ordinance be open to Missouri citizens for inspection and copying. Sections 109.180-190, RSMo 2000. It was enacted in 1961, twelve years prior to the Sunshine Law.

Generally, every record that could be obtained under the Public Records Law could also be obtained under the Sunshine Law. Nevertheless, the Public Records Law should not be overlooked as it could be a source of records that would otherwise be unavailable under the Sunshine Law. For example, the Industrial Development Funding Act, § 100.296, RSMo 2000, provides that it is not subject to the Sunshine Law, Chapter 610, or to Chapter 109.250-297 (which governs records retention and disposition). However, the IDFA is not exempt from the Public Records Law. Section 109.180, RSMo 2000.

#### **B. Narrow Definition of Public Record.**

##### **1. Definitional vs. Functional Approach.**

In contrast with the Sunshine Law, which defines public record broadly to include any record retained by or of a public governmental body, § 610.010(4) RSMo 2000, the Public Records Law defines "public record" narrowly to include only records kept pursuant to statute or ordinance, § 109.180 RSMo 2000.

The Sunshine Law takes a functional approach to public records. Under the Sunshine Law, records must be disclosed if they reflect deliberations or decisions that in any way affect the public. *See, generally, MacLachlan v. McNary*, 684 S.W.2d 534, 538 (Mo.App. E.D. 1984). Under the Public Records Law, even if a record reflects such public matters, it is only subject to disclosure if it is kept pursuant to statute or ordinance. Section 109.180, RSMo 2000.

##### **2. Source of Documents.**

The Public Records Law applies only to state, county and municipal records. *Id.* It does not apply to other types of public governmental bodies included in the Sunshine Law.

### **3. Form of Documents.**

The Public Records Law does not expressly restrict public records to particular physical forms, but merely refers to records, instruments or documents. *Id.*

### **C. Access Limited To Missouri Citizens.**

Only Missouri citizens may request public records pursuant to the Public Records Law, § 109.180, RSMo 2000 (... records kept pursuant to statute or ordinance shall... be open for a personal inspection by any citizen of Missouri).

### **D. Access Limited by Reasonable Rules and Conditions.**

Even where a records falls within the more limited definition of public record in the public records law, and would otherwise be subject to disclosure, public access is subject to reasonable rules and restrictions imposed by proper authorities. *State ex rel. Gray v. Brigham*, 622 S.W.2d 734, 735 (Mo.App. E.D. 1981).

### **E. Fees.**

The Public Records Law authorizes the lawful custodian of public records to charge a reasonable rate for his services and for the services of a deputy to supervise the work and for the use of the room or place where the work is done. Section 109.190 RSMo 2000.

### **F. Remedies.**

Any public official who violates § 109.180 is subject to removal or impeachment, and criminal prosecution. Violation of § 109.180 is a misdemeanor punishable by a fine of \$100, confinement in the county jail for a period not to exceed 90 days, or both. *Id.*