

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

UNITED FOR MISSOURI, )

CARL BEARDEN, )

and )

RYAN JOHNSON, )

Plaintiffs, )

v. )

OFFICE OF ADMINISTRATION, )

State of Missouri, )

Serve: )

Sarah Steelman )

Commissioner of Administration )

Capitol Building, Room 125 )

Jefferson City, MO 65101 )

and )

BRANDI CARUTHERS, in her )

official capacity as Custodian of )

Records for the Division of )

Personnel, Office of Administration )

State of Missouri, )

Serve: )

Brandi Caruthers )

Custodian of Records )

Office of Administration )

Truman Building, Room 430 )

301 W. High Street )

Jefferson City, MO 65101 )

Defendants. )

Case No. \_\_\_\_\_

## **PETITION FOR DECLARATORY JUDGMENT**

**COMES NOW** Plaintiffs and for their Petition states as follows:

1. This is a suit to access public records. The Office of Administration has purposely treated information in the "current list of active bargaining unit employees" as closed, refusing to provide the information to Plaintiffs, while providing the same information to the Union, without any legal justification.

2. Plaintiff United for Missouri ("UFM") is a Missouri Non-Profit Corporation, registered with the Missouri Secretary of State and in good standing. United for Missouri is committed to educating and mobilizing citizens about the impact of limited government and economic policy on the state and the impact of the federal government exceeding its Constitutional limits on achieving growth, opportunity and prosperity. United for Missouri's programs, analyses and issue advocacy will help state and federal legislators, statewide elected officials, state agencies, the media and individual citizens understand why policies that promote the American free enterprise system are the best method to ensuring prosperity for all Missourians.

3. Plaintiff Carl Bearden is an individual and taxpayer of Missouri. Carl Bearden serves as the Chief Executive Officer of United for Missouri.

4. Plaintiff Ryan Johnson is an individual, taxpayer and resident of Missouri.

5. Defendant Office of Administration ("State" or collectively with the Custodian, "State Defendants") is the service and administrative control agency created pursuant to Article IV, section 50 of the Missouri Constitution and Section 37.005, RSMo, to combine and coordinate the central management functions of state government with its principal place of business in Jefferson City, Missouri.

6. Defendant Brandi Caruthers ("Custodian") is the designated Custodian of Records for the Office of Administration's Division of Personnel.

7. Venue is proper in Cole County Circuit Court pursuant to Section 610.027.1, RSMo.

8. Plaintiffs bring this action pursuant to Chapter 610, RSMo.

### Factual Allegations Common to All Counts

#### **A. The "List"**

9. Pursuant to Article 2, section 4 of the Master Labor Contract between the State and the American Federation of State, County and Municipal Employees Council 72 (the "Union"), the State is required to provide the following information to the Union:

Once each quarter, and in electronic format, the Office of Administration will provide the union with a current list ["List"] of active bargaining unit employees. This list shall include the information contained in the information fields (Appendix D) for each employee within these bargaining units.

A true and correct copy of The Master Labor Contract, including Appendix D, is attached as Exhibit A and incorporated by reference as if fully set out here.

10. On information and belief, the List is provided to the Union in an excel file format, which includes approximately 70 columns of information, with each row relating to an individual employee.

11. On information and belief, the State has provided the List, unredacted, to the Union.

12. On information and belief, the State provides the List to the Union with the following columns unredacted: "JOBS\_LONG\_DESC" (Job Status Code Long Description), "WORK\_CNTY\_LNG\_DESC" (Work County Long Description), "WORK\_LOC\_CD" (Location Code identified as the work location), "WORK\_LOC\_LONG\_DESC" (Work Location Long Description),

“WORK\_LOC\_ADDR\_LINE\_1” (First Line of the street address), “WORK\_LOC\_ADDR\_LINE\_2” (Second line of the street address), “WORK\_LOC\_CITY\_NM” (The name of the city associated with the work location address), “WORK\_LOC\_ST\_CD” (The state code associated with the work location address), and “WORK\_ LOC\_ ZIP\_SUF” (The Zip Code [*sic*] Prefix is the four digit zip code extension).

### **B. Johnson Request**

13. On February 6, 2019, Ryan Johnson sent an open records request to the State, requesting: “A copy of each 'list of active bargaining unit employees' sent to AFSCME Council 72 in 2015, 2016 and 2018 as required by Article 2, section 4 of the Master Labor Contract between the State of Missouri and AFSCME Council 72.” A true and correct copy of the open records request is attached as Exhibit B and incorporated by reference as if fully set out here.

14. On information and belief, on or about February 6, 2019, the Custodian for the Office of Administration received the request from Mr. Johnson.

15. On February 7, 2019, Kelly Hopper, Legal Counsel for the Office of Administration, responded with twelve records ("Excel Files"), noting "individually identifiable personnel information" had been "redacted pursuant to section 610.021(13), RSMo, and Office of Administration Policies B-36 and C-7." A true and correct copy of Mr. Hopper's response to the open records request is attached as Exhibit C and incorporated by reference as if fully set out here. A true and correct copy of the first and last page of one of the Excel Files is attached as Exhibit C-1 and incorporated by reference as if fully set out here (each and every page of each and every Excel File is redacted similarly).

16. The Excel Files were approximately 30 pages in length each and contained 70 columns (A through BR). The columns are identical to Appendix

D of the Master Labor Contract, with the addition of "SENIORITY\_DATE." A true and accurate list of the column headings is attached as Exhibit D and incorporated by reference as if fully set out here.

17. Of the 70 columns, only seven were **not** redacted: TITL\_LONG\_DESC (Job Classification), HOME\_AGCY\_LNG\_DESC (Long Description for Home Agency Code), EMP\_LAST\_NAME (Employee Last Name), EMP\_FIRST\_NAME (Employee First Name), EMP\_MIDDLE\_NAME (Employee Middle Name), TOTAL\_PAY\_RATE\_AMT (Base pay for an employee plus their differential pay), and OTHER\_PAY\_PERD\_AMT (component of salary for an employee that is not considered base pay or differential pay).

18. As of August 30, 2019, the State Defendants have not provided an unredacted copy of the List.

### **C. Bearden Request**

19. On February 19, 2019, Marc Ellinger, on behalf of UFM and Carl Bearden, sent an open records request to the State, requesting: "The name, work and home addresses of each employee from the 'list of active bargaining unit employees' sent to AFSCME Council 72 in 2016, 2017 and 2018 as required by Article 2, section 4 of the Master Labor Contract between the State of Missouri and AFSCME Council 72." A true and correct copy of the Open Records Request is attached as Exhibit E and incorporated by reference as if fully set out here.

20. On information and belief, on or about February 19, 2019, the custodian of records for the Office of Administration received the request from Mr. Ellinger.

21. On February 22, 2019, Kelly Hopper, Legal Counsel for the Office of Administration, responded with twelve records ("Excel Files"), noting such

records "have been redacted to remove individually identifiable personnel information in accordance with section 610.021(13), RSMo and Office of Administration Policies B-36 and C-7." A true and correct copy of Mr. Hopper's response to the open records request is attached as Exhibit F and incorporated by reference as if fully set out here. A true and correct copy of the first and last page of one of the Excel Files is attached as Exhibit F-1 and incorporated by reference as if fully set out here (each and every page of each and every Excel File is redacted similarly).

22. The Excel Files were approximately 30 pages in length each and contained 70 columns (A through BR). See Exhibit F-1. The columns are identical to Appendix D of the Master Labor Contract, with the addition of "SENIORITY\_DATE." See Exhibit D.

23. Of the 70 columns, only seven were **not** redacted: TITL\_LONG\_DESC (Job Classification), HOME\_AGCY\_LNG\_DESC (Long Description for Home Agency Code), EMP\_LAST\_NAME (Employee Last Name), EMP\_FIRST\_NAME (Employee First Name), EMP\_MIDDLE\_NAME (Employee Middle Name), TOTAL\_PAY\_RATE\_AMT (Base pay for an employee plus their differential pay), and OTHER\_PAY\_PERD\_AMT (component of salary for an employee that is not considered base pay or differential pay).

24. On February 27, 2019, Marc Ellinger responded to Mr. Hopper's letter of February 22, 2019, asserting the following nine data fields (regarding job description and work location) should have been provided, rather than redacted:

"JOBS\_LONG\_DESC" (Job Status Code Long Description),  
 "WORK\_CNTY\_LNG\_DESC" (Work County Long Description),  
 "WORK\_LOC\_CD" (Location Code identified as the work location),  
 "WORK\_LOC\_LONG\_DESC" (Work Location Long Description),

“WORK\_LOC\_ADDR\_LINE\_1” (First Line of the street address), “WORK\_LOC\_ADDR\_LINE\_2” (Second line of the street address), “WORK\_LOC\_CITY\_NM” (The name of the city associated with the work location address), “WORK\_LOC\_ST\_CD” (The state code associated with the work location address), and “WORK\_LOC\_ZIP\_SUF” (The Zip Code [*sic*] Prefix is the four digit zip code extension)

A true and correct copy of Mr. Ellinger's response is attached as Exhibit G and incorporated by reference as if fully set out here.

25. On March 1, 2019, Mr. Hopper sent Policies B-36 and C-7 via email to Marc Ellinger, noting that Policy C-07 had been previously rescinded. A true and correct copy of Mr. Hopper's email is attached as Exhibit H and incorporated by reference as if fully set out here. True and correct copies the policies are attached as Exhibits H-1 and H-2 and incorporated by reference as if fully set out here.

26. On March 7, 2019, Mr. Hopper responded stating that the "nine data fields from records pertaining to employees...are exempt from disclosure under section 610.021(13)." A true and correct copy of Mr. Hopper's response is attached as Exhibit I and incorporated by reference as if fully set out here.

27. As of August 30, 2019, the State Defendants have not provided an unredacted copy of the List.

#### **D. Chapter 610, RSMo**

28. Generally, Chapter 610, RSMo, governs the definition of a public record, the process by which the public may access public records, the costs associated with the research and copying of records, and specific exceptions that would allow a governmental body to refuse production of records.

29. “Chapter 610 represents a legislative determination and declaration of the public policy of the state relating to meetings, records, and votes of all public governmental bodies; that policy being, in general, that such

meetings, records and votes be open and available to the people these bodies serve.” *Cohen v. Poelker*, 520 S.W.2d 50, 54 (Mo. banc 1975).

30. It is the public policy of the State of Missouri that the provisions of the Sunshine Law be liberally construed. 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, RSMo.

31. Section 610.022(5), RSMo, also addresses the presumption with respect to public records: “Public records **shall be presumed to be open** unless otherwise exempt pursuant to the provisions of this chapter.”

32. “Chapter 610 ‘opens to the public—even without an interest to vindicate—the meetings and records of those entrusted with the public business’...although certain records may be closed under § 610.025, and other records are not open to the public by reason of the language ‘except as otherwise provided by law,’ contained in § 610.015. When a right to inspect exists, it is exercisable only during business hours and is subject to reasonable rules and conditions imposed by the proper authorities...Subject to the exceptions described in it, § 610.015 mandates public disclosure of public records...The Sunshine Law confers rights on the general public and not on any particular segment of it.” *Oregon Cnty. R-IV Sch. Dist. v. LeMon*, 739 S.W.2d 553, 555-56 (Mo. App. S.D. 1987) (internal citations omitted).

33. Section 610.010(4) defines “public governmental body” as:

[A]ny 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.

34. The Office of Administration is a “public governmental body” as defined by Section 610.010(4), RSMo.

35. Section 610.010(6), RSMo defines “public record”, in pertinent part, as:

[A]ny record, whether written or electronically stored, retained by or of any public governmental body including any report, survey, memorandum, or other document or study prepared for the public governmental body by a consultant or other professional service paid for in whole or in part by public funds, including records created or maintained by private contractors under an agreement with a public governmental body or on behalf of a public governmental body[.]

36. The "List" is a “public record” as defined by Section 610.010(6), RSMo.

37. Section 610.023, RSMo, provides, in pertinent part:

2. Each public governmental body shall make available for inspection and copying by the public of that body's public records...

3. Each request for access to a public record shall be acted upon as soon as possible, but in no event later than the end of the third business day following the date the request is received by the custodian of records of a public governmental body. If records are requested in a certain format, the public body shall provide the records in the requested format, if such format is available. If access to the public record is not granted immediately, the custodian shall give a detailed explanation of the cause for further delay and the place and earliest time and date that the record will be available for inspection. This period for document production may exceed three days for reasonable cause.

38. If a request for access is denied, the custodian shall provide, upon request, a written statement of the grounds for such denial. Such statement shall cite the specific provision of law under which access is denied and shall be furnished to the requester no later than the end of the third business day following the date that the request for the statement is received. *See* Section 610.023, RSMo.

39. Section 610.024.1, RSMo, only allows or redaction of "exempt" material and requires that "nonexempt material" be made available for examination and copying by the public.

40. The State, in responding to the requests of Mr. Johnson and Mr. Ellinger, unlawfully redacted nonexempt material from the List.

41. None of the following information is "exempt": "JOBS\_LONG\_DESC" (Job Status Code Long Description), "WORK\_CNTY\_LNG\_DESC" (Work County Long Description), "WORK\_LOC\_CD" (Location Code identified as the work location), "WORK\_LOC\_LONG\_DESC" (Work Location Long Description), "WORK\_LOC\_ADDR\_LINE\_1" (First Line of the street address), "WORK\_LOC\_ADDR\_LINE\_2" (Second line of the street address), "WORK\_LOC\_CITY\_NM" (The name of the city associated with the work location address), "WORK\_LOC\_ST\_CD" (The state code associated with the work location address), and "WORK\_LOC\_ZIP\_SUF" (The Zip Code [*sic*] Prefix is the four digit zip code extension).

42. Section 610.023, RSMo provides:

No public governmental body shall...grant to any person or entity, whether by contract, license or otherwise, the exclusive right to access ...any public record unless the granting of such right is necessary to facilitate coordination with, or uniformity among, industry regulators having similar authority.

43. By providing the unredacted copy of the List to the Union, the State has unlawfully granted the Union the exclusive right to access such public record.

44. The State never claimed in its responses that its granting of the exclusive right to access the List to the Union was "necessary to facilitate coordination with, or uniformity among, industry regulators having similar authority."

45. Indeed, the granting of the exclusive right to access the List to the Union is not "necessary to facilitate coordination with, or uniformity among, industry regulators having similar authority."

46. Section 610.021(13), RSMo, provides that "names, positions, salaries and lengths of service of officers" of employees are not exempt from Missouri's open records laws.

47. The following information relates to an employee's "position": "JOBS\_LONG\_DESC" (Job Status Code Long Description), "WORK\_CNTY\_LNG\_DESC" (Work County Long Description), "WORK\_LOC\_CD" (Location Code identified as the work location), "WORK\_LOC\_LONG\_DESC" (Work Location Long Description), "WORK\_LOC\_ADDR\_LINE\_1" (First Line of the street address), "WORK\_LOC\_ADDR\_LINE\_2" (Second line of the street address), "WORK\_LOC\_CITY\_NM" (The name of the city associated with the work location address), "WORK\_LOC\_ST\_CD" (The state code associated with the work location address), and "WORK\_LOC\_ZIP\_SUF" (The Zip Code [sic] Prefix is the four digit zip code extension).

48. Section 610.027.3, RSMo, mandates a civil penalty in an amount up to one thousand dollars for knowing violations of Sections 610.010 to 610.026, RSMo.

49. For purposeful violations, Section 610.027.4, RSMo, mandates a civil penalty and payment of costs and attorneys fees:

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.

50. The actions described herein constitute **three** separate, purposeful violations of Chapter 610, RSMo.

51. The State Defendants' continued refusal to provide the unredacted List constitutes additional and purposeful violations of Chapter 610, RSMo.

## COUNT I

### DECLARATORY JUDGMENT - JOHNSON REQUEST

52. Plaintiffs incorporate the preceding paragraphs of this petition as if fully set forth herein.

53. “The mandate of § 610.015 is that public records must be disclosed in the absence of another statute barring disclosure.” *Am. Civil Liberties Union of Missouri Found. v. Missouri Dep't of Corr.*, 504 S.W.3d 150, 155 (Mo. App. W.D. 2016) (citing *Oregon County R-IV Sch. Dist. v. LeMon*, 739 S.W.2d 553, 560 (Mo. App. S.D. 1987)).

54. The State has violated the provisions of Chapter 610, RSMo, by failing to respond to Mr. Johnson’s February 6, 2019 open records request.

55. To date, Mr. Johnson has not received an unredacted List from State Defendants.

56. “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).

57. The State Defendants are aware of the requirements and consequences for failure to comply with Chapter 610, RSMo.

58. The State Defendants' continued failure to respond to Mr. Johnson's open records request demonstrates a deliberate and purposeful violation of Chapter 610, RSMo.

59. The State Defendants, in failing to respond such that Plaintiffs are forced to file a lawsuit to obtain the requested open records, have purposefully violated Chapter 610, RSMo.

60. The actions set forth above evidence a pattern and practice of behavior with the intent to prevent the disclosure of public records by the State Defendants, behavior which is contrary to the public policy of the State of Missouri set forth in Section 610.011, RSMo.

61. Plaintiffs have incurred costs and attorney's fees in bringing this action.

**WHEREFORE**, Plaintiffs pray that this Court find that the State Defendants purposefully violated the provisions of Chapter 610, RSMo; order the State Defendants to produce the requested records in an unredacted format; order the State Defendants to pay a civil penalty; order payment by the State Defendants of Plaintiffs' costs and attorney's fees; and such other relief as this Court deems appropriate.

## COUNT II

### DECLARATORY JUDGMENT - BEARDEN REQUEST

62. Plaintiffs incorporate the preceding paragraphs of this petition as if fully set forth herein.

63. The State has violated the provisions of Chapter 610, RSMo, by:

a. Failing to respond to Mr. Ellinger's February 19, 2019 open records request; and

b. Failing to respond to Mr. Ellinger's February 27, 2019 renewed open records request.

64. To date, Mr. Ellinger has not received an unredacted List from State Defendants.

65. "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).

66. The State Defendants are aware of the requirements and consequences for failure to comply with Chapter 610, RSMo.

67. The State Defendants' continued failure to respond to Mr. Ellinger's open records request and renewed request demonstrates a deliberate and purposeful violation of Chapter 610, RSMo.

68. The State Defendants, in failing to respond such that Plaintiffs are forced to file a lawsuit to obtain the requested open records, have purposefully violated Chapter 610, RSMo.

69. The actions set forth above evidence a pattern and practice of behavior with the intent to prevent the disclosure of public records by the State Defendants, behavior which is contrary to the public policy of the State of Missouri set forth in Section 610.011, RSMo.

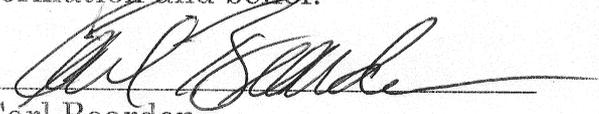


Florida  
STATE OF MISSOURI )  
COUNTY OF Manate )

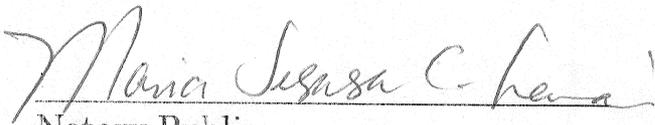
ss.

VERIFICATION

Carl Bearden, of lawful age, being duly sworn on his oath, states he has read the foregoing Petition and the statements contained therein are true and correct according to his best knowledge, information and belief.

  
Carl Bearden

Subscribed and sworn to before me, a notary public, on the 300 day of September, 2019.

  
Notary Public

My Commission Expires: 02/02/2022

