

**IN THE CIRCUIT COURT OF BOONE COUNTY
STATE OF MISSOURI**

KEVIN A. ELMER,)
)
Plaintiff,)

v.)

PAULA BARRETT, in her official capacity as the)
Custodian of Records for the University of)
Missouri,)
Serve: Paula Barrett)
University of Missouri)
215 University Hall)
Columbia, MO 65211)

Hold for Entry of Appearance)

and)

THE CURATORS OF THE UNIVERSITY OF)
MISSOURI,)
Serve: Pamela Q. Henderson, Chair)
The Curators of the University)
Of Missouri)
316 University Hall)
Columbia, MO 65211)

Hold for Entry of Appearance)

and)

JOSHUA D. HAWLEY,)
Serve: Joshua D. Hawley)
5215 E. Highway 163)
Columbia, MO 65201)

Hold for Entry of Appearance)

and)

Cause No.:

Div. No.:

JURY TRIAL DEMANDED

GARY MYERS,)
 Serve: Gary Myers)
 University of Missouri School of Law)
 203 Hulston Hall, Rm. 230)
 Columbia, MO 65211)
)
Hold for Entry of Appearance)
)
 Defendants.)

PETITION

Plaintiff Kevin A. Elmer (“Elmer”), for his Petition against Defendants Paula Barrett, in her official capacity as the Custodian of Records for the University of Missouri (the “Custodian”); the Curators of the University of Missouri (the “Curators”); Joshua D. Hawley (“Hawley”) and Gary Myers (“Myers” and, collectively with the Custodian, the Curators and Hawley, “Defendants”), states as follows:

INTRODUCTION

1. It seems every generation needs to re-learn the line between governmental and political activity. Almost 23 years ago, former Missouri Attorney General William L. Webster was sentenced to two years in prison for, among other things, converting state resources for campaign purposes by using state computers and printers for campaign purposes and having state employees campaign at taxpayer’s expense.¹

2. Former University of Missouri School of Law Associate Professor Josh Hawley is running for Attorney General. It is undisputed that Hawley was (1) running for full-time statewide political office while employed and paid by the University; (2) received unprecedented support from some University officials; and (3) used state taxpayer funded computers and other facilities for political purposes. The remaining questions are for how long Hawley has been

¹ *St. Louis Post Dispatch*, Thursday, June 3, 1993, main edition, Page 1 and *St. Louis Post Dispatch*, Wednesday, September 22, 1993, Other Editions, Page 12.

running while on the University's payroll, the degree of support he was given and how much he used state resources to do so.

3. To investigate the answers to these questions, on May 28, 2015, Elmer sent an open records request to the Custodian, pursuant to Chapter 610 of Missouri Statute (the "Missouri Sunshine Law"). A true and accurate copy of Elmer's initial request is attached hereto as Exhibit A and incorporated herein by reference.

4. After paying almost \$5,000.00 to the Curators of the University of Missouri System (the "University"), Elmer has been waiting for nearly a year for access to e-mails and documents created, sent and received on Hawley's taxpayer-funded University computer over a two-year period. Hawley is currently on a leave of absence to run in the Republican Primary for Attorney General for the State of Missouri, who ironically, is the primary enforcer of the Missouri Sunshine Law.

5. For months, Elmer has been met with obstructive and delaying tactics, couched in a litany of intermittent non-responsive responses from the Custodian. Only after threatening suit six months into the request did the bulk of the responsive documents start to be produced. However these documents are being produced at an unreasonably stilted pace and subject to vague and amorphous assertions of privilege.

6. An arrangement was brokered between the Custodian, Hawley and Myers to allow Hawley to determine what records were to even be considered for review by the Custodian, let alone produced to Mr. Elmer. The Missouri Sunshine Law specifically prohibits such a delegation of the Custodian's duties. *See* Mo. Rev. Stat. § 610.023. This delegation is all the more egregious in that the Custodian and the University are allowing the subject of an open records request unchecked power to determine which documents should even be considered for

production. The opportunity for, and evidence supporting, impropriety in this instance is staggering.

7. Hawley and Myers agreed that Hawley could syphon e-mails concerning what he subjectively believed to be “University business” from his computer and limit the Custodian’s review to such e-mails. Contrary to any of the Defendants’ personal beliefs of what constitutes “University business,” a public record is “[a]ny record, whether written or electronically stored, retained by or of any public governmental body...” Records contained on Hawley’s University computer, irrespective of how he elects to characterize those e-mails in the face of Elmers’ open records requests, are public records unless specifically closed by another provision of law. *See* Mo. Rev. Stat. §§ 610.021, 610.022.5, 610.023, 610.024.

8. There is absolutely no reasonable belief that it would take almost a year to produce two years of e-mails and documents from one computer.

9. It is undisputed that the Custodian has only produced approximately twenty-five percent (25%) of the e-mails requested, and none of the other documents created or contained on Hawley’s University computer, which were requested in May of 2015. The Custodian’s response, or lack thereof, may well be strategic. At the present rate, production will extend long after the primary and general elections. Although specifically required by law and requested numerous times, the University has refused to furnish a detailed explanation for the delay and provide “the place and earliest time and date that the record[s] will be available for inspection.” Mo. Rev. Stat. § 610.023.3-4. There is no justification for such a delay, and this Court should order immediate compliance and refund Mr. Elmer’s nearly \$5,000.00 in payments to the University.

10. Moreover, the Custodian has charged an exorbitant amount for the gathering and duplication of records that has yet to occur.² Under the Missouri Sunshine Law, the Custodian may charge a per page price for copies (not applicable to this request) and an hourly fee for duplicating time not to exceed the average hourly rate of pay for *clerical* staff. Mo. Rev. Stat. § 610.026.1(1). Moreover, the Custodian is required to use employees who result in the lowest amount of charges for search, research, and duplication time. *Id.* Failure to provide an itemized list of charges outright ignores, let alone attempts to satisfy, the Custodian's obligation to demonstrate the reasonableness of charges. That Elmer, out of a sense of urgency, ultimately agreed to pay a portion of this bloated pricing scheme does not waive his assertion of this conduct as a violation of the Missouri Sunshine Law. This is especially true where, as here, Elmer was forced to abandon certain requests because of the exorbitant pricing and, for those requests he did pay for more than ten (10) months ago, he still has not received each and every responsive document.

11. Upon information and belief, Professor Hawley stored campaign fundraising lists on his state computer as early as 2012, while considering a run for Attorney General in 2012. Also, upon information and belief, Professor Hawley initially sought and was granted by Myers, a *paid* leave of absence including a salary of over \$100,000, plus benefits by the Dean of the Law School in violation of University policy. Subsequently, Myers granted Professor Hawley his current *unpaid* leave which did not begin until well over a month after he filed his campaign committee and raised over \$150,000.00 in political contributions for his campaign.

² The Custodian and the University seem to have a history repelling unwanted claims with improper and exorbitant pricing schemes. See *St. Louis Post Dispatch*, May 18, 2016, online edition, http://m.stltoday.com/news/local/education/article_c92d13b8-5e42-5a4c-932c-db7102693eb6.html. Also, See *Animal Rescue Media Education v. Board of Cur, et. al.* 16BA-CV01710. **Indeed, Elmer has, in response to one category of his open records request, received a fee structure of more than \$17,000 in order for the University to respond. Mr. Elmer has chosen to date not to pay the outrageous fees.**

12. Myers successfully lobbied the Custodian to allow Hawley and Defendant to shield documents he deemed not related solely to University administration and governance from production. Finally, Hawley was able to ensure that the University's policy change to crack down on the political activity did not apply to his campaign. A smattering of documents already produced reveal that Hawley was engaged in political and/or campaign activities on his state computer. Records relating to his special deals and his use of state resources for political purposes are all unqualifiedly subject to production.

13. Engaging in the foregoing purposeful obstructive and delaying tactics, Defendants have violated nearly every duty they have under the Missouri Sunshine Law with regard to the requested records concerning Hawley. Indeed, it would be difficult to envision a more egregious set of facts than the following: (1) a revolving door of intermittent e-mails, stalling the production of responsive documents; (2) the blanket assertion of non-particularized exemptions in lieu of responsive documents; (3) a failure to account for, or even provide an excuse for, the crawling pace at which documents are being produced; (4) the failure and refusal to provide a reasonable estimate as to when documents will be produced; (5) the imposition of exorbitant fees to retrieve the records and then only attempting to fulfill such obligations upon the threat of a lawsuit; (6) illegally delegating the review of documents to the object of the document request; and (7) engaging in each of the foregoing actions in an attempt to aid and abet Hawley's efforts to deny the production of any documents exposing the fact that he used University, and therefore State, resources for campaigning and other personal and political purposes.

PARTIES, JURISDICTION AND VENUE

14. Elmer is a resident of Christian County, State of Missouri, and is an aggrieved party under to Mo. Rev. Stat. §§ 610.011, *et seq.*

15. The Custodian is the Custodian of Records for the University of Missouri System (the “University”), a public governmental body, and is responsible for the maintenance of the University’s records and for making such documents available for inspection and copying pursuant to Mo. Rev. Stat. § 610.023.

16. The Curators are a body politic, with the power to sue and be sued, lawfully charged with the governance of the University, which is incorporated therein. The Curators are governed by a board of nine (9) curators who are appointed by the governor of the State of Missouri with the advice and consent of the Senate. Mo Const. art. IX § 9(a); Mo. Rev. Stat. §§ 172.010, *et seq.*

17. Hawley is a resident of Boone County, Missouri and is a tenured professor of law at the University of Missouri School of Law. The Curators have the authority to appoint, remove and fix the duties and compensation of professors, including Hawley. Mo. Rev. Stat. § 172.300. Hawley is also a declared Republican candidate for the 2016 election for the Attorney General for the State of Missouri.

18. Myers is a resident of Boone County, Missouri and is the dean of the University of Missouri School of Law.

19. This Court has jurisdiction over Defendants pursuant to Mo. Rev. Stat. §§ 610.027 and 610.030 because the causes of action asserted herein arise out of the transaction of business within the State of Missouri.

20. This Court further has jurisdiction, and venue is proper in this Court, pursuant to Mo. Rev. Stat. § 610.027(1), because the University has its principal place of business in Boone County, Missouri.

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

21. Upon information and belief, prior to April 6, 2016, Hawley requested, and was granted by Myers, paid leave from the University to run for the public office of Attorney General for the State of Missouri.

22. Pursuant to, and evidencing, his request for paid leave, on or around April 6, 2015, Hawley was not scheduled to teach any classes at the University for the Summer or Fall semesters of 2015. A true and accurate copy of the April version of the Fall 2015 and Spring 2016 course schedule is attached hereto as Exhibit Q and incorporated herein by reference.

23. Any grant of paid leave to Hawley would have violated University policy for paid personal leave and such financial support for political purposes would also clearly violate the University's policy on conflicts of interest.³

24. Upon information and belief, the University rescinded its grant of paid leave to Hawley and was directed to re-submit his leave request as unpaid.

25. On or around May 22, 2015, Hawley requested leave *without* pay from Myers, again, to run for the public office of Attorney General of the State of Missouri.

26. Hawley was granted leave *without* pay for a year, beginning September 1, 2015 and ending August 31, 2016 by Myers and Garrett Stokes, Provost and Executive Vice Chancellor for Academic Affairs at the University. In granting an unpaid leave that *began* September 1, 2015, Hawley was authorized payment of his full University salary for more than a month after he had declared his candidacy for statewide office. Moreover, given that Hawley was removed in April of 2015 from the teaching schedule for the Summer and Fall semesters of

³ See Section 330.015 of University Collected Rules and Regulations, titled Policy on Conflict of Interest, which provides that University employees "shall not knowingly use University property, funds, position or power for personal or political gain ... [and] ... shall inform their supervisors in writing of reasonably foreseen potential conflicts."

2015, it appears the University subsidized Hawley from approximately May 15, 2015 (law school graduation) until his unpaid leave began on September 1, 2015. Such a public subsidy of a political campaign would presumably violate University policy, constitute an undisclosed campaign contribution in violation of Missouri ethics provisions, violate the Missouri Constitution, and contravene federal IRS regulations pertaining to non-profit organizations.⁴ Hawley raised and accounted for \$151,626.00 for his campaign for the Attorney General of the State of Missouri while being paid his full salary by the University.⁵

27. On July 23, 2015, Hawley filed his Statement of Committee Organization for “Hawley for Missouri” to run in the Republican primary for Attorney General for the State of Missouri. He was the treasurer for his own campaign.⁶

28. One day after Hawley filed his Statement of Committee Organization to run for Attorney General, on July 24, 2015, the Board of Curators convened (the “Board of Curators Meeting”) and, among other things, amended section 330.050 of the Collected Rules and Regulations, titled “Political Activities.” A true and accurate copy of the minutes from the Board of Curators Meeting is attached hereto as Exhibit K and incorporated herein by reference.

29. The amendment to section 330.050 was a direct reaction to the political activities of Hawley. (*See* Exhibit K). Whereas section 330.050 originally provided that a University staff member seeking election to statewide office “must resign or request a leave of absence as of the date of filing in the primary,” the amendment set forth a much earlier requirement by providing that:

⁴ The University is prohibited from supporting a candidate. Also, *See* 26 CFR 1.501(c) (3)-1.

⁵ *See* Hawley for Missouri’s October 2015 MEC Report covering July 23, 2015 through September 30, 2015: <http://tinyurl.com/hjy4998>.

⁶ *See* Hawley for Missouri Statement of Committee Organization: <http://www.mec.mo.gov/Scanned/PDF/2015/113758.pdf>

Any University employee seeking election to any full time public office in local, county, state or the federal government or exploring whether to seek such an office **must resign or be granted a leave of absence as of the earliest of the following dates:** the date of registration of an exploratory committee with the appropriate local, state or federal campaign finance authority; the date of registration of a candidate committee with the appropriate local, state or federal campaign finance authority; or the date of filing in the primary.

See Ex. K (emphasis added).

30. Upon information and belief, prior to filing his campaign committee, Hawley and/or independent counsel retained by Hawley, provided a legal memorandum to the Board of Curators opposing the production of Hawley's e-mails and the contents of his University computer and threatened litigation against the University if such documents were produced.

31. Upon information and belief, Hawley was observed utilizing and maintaining fundraising lists on his University computer as early as 2012, when he was considering running for Attorney General that year.

32. After declaring his candidacy for the office of Attorney General for the State of Missouri on July 31, 2015, Hawley was granted tenure by the University, conditioned on his return to the University after his leave of absence, which can be extended by the University Chancellor, to allow Hawley to compete in the general election for Attorney General should he prevail in the Republican primary election.

33. At the time of his leave of absence, Hawley made a salary of \$102,839.00 from the University.

34. In an effort to determine whether University leave policy was violated, to investigate whether University property was improperly used for campaign purposes, and to determine the level of support, financial or otherwise, that Hawley received for his campaign

activities by the University of Missouri Law School,⁷ Elmer issued a series of open records requests pursuant to Chapter 610 of the Missouri Statutes (the “Missouri Sunshine Law”) to Paula Barrett, in her capacity as the Custodian of Records for the University.

35. In particular, on May 28, 2015 at 8:18 p.m., Elmer sent an open records request (per the Defendants’ internal tracking system, hereinafter “Request 4844”), pursuant to the Missouri Sunshine Law, to the Custodian via e-mail. *See* Ex. A.

36. Request 4844 seeks, *inter alia*, copies of, or the opportunity to inspect, the following documents:

- a. All e-mails sent or received by Associate Professor Josh Hawley (“Request #1”);
- b. All phone records for any office phone or University issued cell phone for Associate Professor Josh Hawley (“Request #2”);
- c. All documents contained on any computer used by Associate Professor Josh Hawley, an employee of the University of Missouri (“Request #3”);
- d. All emails sent or received from Dean Gary Myers making any reference to the office of the Attorney General (“Request #13”);
- e. All emails sent or received from Dean Gary Myers making any reference to Josh Hawley (“Request #14”);
- f. All emails sent or received from Casey Baker making reference to the office of the Attorney General (“Request #15”);
- g. All emails sent or received from Casey Baker making reference to Josh Hawley (“Request #16”);
- h. All emails sent or received from Tim Wolfe making reference to the office of the Attorney General (“Request #17”);
- i. All emails sent or received from Tim Wolfe making reference to Josh Hawley (“Request #18”);

⁷ Elmer has no choice but to make some allegations herein “upon information and belief,” as the essence of this lawsuit is that Elmer has been wrongfully denied, and continues to be so denied, access to public records which would substantiate or dismiss these allegations.

- j. All emails sent or received from R Bowen Loftin making reference to the office of the Attorney General (“Request #19”);
- k. All emails sent or received from R Bowen Loftin making reference to Josh Hawley (“Request #20”);
- l. All emails sent or received from Krista Jennings making reference to the office of the Attorney General (“Request #21”);
- m. All emails sent or received from Krista Jennings making reference to Josh Hawley (“Request #22”);
- n. All emails sent or received from Garnett Stokes making reference to the office of the Attorney General (“Request #23”); and
- o. All emails sent or received from Garnett Stokes making reference to Josh Hawley (“Request #24” and collectively with Requests #1-3 and #13-23, the “Authorized Requests”).

See Ex. A.

37. On June 2, 2015 at 10:20 a.m., the Custodian provided an “interim response” via e-mail (the “First Interim Response”) to Request 4844. A true and accurate copy of the First Interim Response is attached hereto as Exhibit B and incorporated herein by reference. The First Interim Response provided:

Due to the large scope of your request, we will need additional time to respond to your request, including determining the extent to which costs will be charged. **We estimate that we will have a further response within the next two weeks.**

See Ex. B (emphasis added).

38. On June 11, 2015 at 2:38 p.m., the Custodian provided further response via e-mail to Request 4844 (the “Second Interim Response”). A true and accurate copy of the Second Interim Response is attached hereto as Exhibit C and incorporated herein by reference. The Second Interim Response provided:

We are acting on your request in compliance with the Sunshine Law as soon as possible, however we will need **additional time** to provide a further response concerning costs and production of responsive documents. This is due to several factors, including the very large scope of your request.

See Ex. C.

39. The Second Interim Response further provided:

Additional time is also needed because many of your requests will require extensive review effort to separate closed records from those that are open. It is impossible at this stage to identify all potential bases for closure that might apply, but it is apparent that there likely will be responsive records that are subject to closure. Examples would include records identifying students that constitute educational records protected by the federal Family Educational Rights and Privacy Act. Such records could be among those responsive to several items of your request, including but not limited to 1-3, 7, 11, and 12. Other examples of records that might be closed would include, but not be limited to, records responsive to items 1-3, 7, 11, and 13-24 that potentially could be closed pursuant to Section 610.021(1), (13), and (14), RSMo. It has not been determined yet whether potentially applicable bases for closure will be asserted or waived for any particular documents.

Additional time is needed because of the significant initial effort required to estimate the applicable costs associated with providing responsive documents and determine the extent to which costs should be charged.

Id.

40. The Second Interim Response also provided that: “[w]e anticipate that we will be in position to provide a further substantive response to your request addressing issues of cost and earliest time at which it is anticipated that records would be available by next Wednesday.” *Id.* The “next Wednesday” referenced in the Second Interim Response is Wednesday, June 17, 2015.

41. On June 16, 2015, at 11:45 a.m., Hawley sent an e-mail to Myers and general counsel to the University (hereafter “University Counsel”) regarding Request 4844. A true and accurate copy of a June 16, 2015 e-mail sent by Hawley is contained within the e-mail exchange, attached hereto as Exhibit D⁸ and incorporated herein by reference.

42. In the e-mail, Hawley writes: “[a]fter discussing this request with Dean Gary Myers, Dean Myers urged me to contact you.” *See Ex. D.* Hawley goes on to provide that

⁸ Exhibits D, E, and J were received in response to a Sunshine Law Request by Mr. Elmer. By providing these documents, any claim of privilege by defendants is hereby waived.

Request 4844 “raises significant questions of academic freedom” and that Request 4844 is “to be an attempt to intimidate, harass, and threaten—and potentially to interfere with tenure deliberations.” *Id.* Hawley also sets forth a legal analysis against the disclosure of his e-mails, phone records and documents stored on his computer. *Id.* In closing, Hawley states: “before the University collects or releases any material, I wanted to bring these concerns to your attention as well.” *Id.*

43. On June 16, 2015 at 4:22 p.m., Myers responded to the e-mail sent by Hawley. A true and accurate copy of a June 16, 2015 e-mail sent by Myers is contained within the e-mail exchange attached hereto as Exhibit D. In his e-mail, Myers states: “[t]o the extent [Request 4844] also seeks information related to Professor Hawley’s tenure application and the tenure decision-making process, the request similarly threatens the integrity of the University’s tenure procedures.” *Id.* In closing, Myers writes: “[a]s dean of the law school, I want to be sure that these important **institutional considerations** are part of the legal analysis as to this request.” *Id.* (emphasis added).

44. On June 17, 2015 at 12:40 p.m., the Custodian provided Hawley with an advance copy of a proposed response to Request 4844 (the “Advance Copy”). A true and accurate copy of the June 17, 2015 e-mail from the Custodian, providing Hawley with the Advance Copy is contained in the e-mail exchange attached hereto as Exhibit E and incorporated herein by reference.

45. On June 17, 2015 at 12:46 p.m., only six (6) minutes after sending the Advance Copy to Hawley, the Custodian sent another e-mail response to Elmer regarding Request 4844 (the “Third Interim Response”) which provided: “[d]ue to the availability of relevant personnel our further response to this request will be delayed until Thursday or Friday of this week.” A

true and accurate copy of the Third Interim Response is attached hereto as Exhibit F and incorporated herein by reference.

46. On June 17, 2015 at 12:59 p.m., Hawley sent an e-mail to Myers and University Counsel regarding the Advance Copy. A true and accurate copy of the June 17, 2015 e-mail from Hawley regarding the Advance Copy is contained in the e-mail exchange attached hereto as Exhibit E. In the e-mail, Hawley states the following:

The response to Requests 1-3 imply that the University has determined to turn over all or some of my email correspondence, documents, and phone records. Per my email yesterday, I doubt these records are properly subject to disclosure. **I respectfully request that the University delay or condition the response until the General Counsel's Office has had the opportunity to examine these questions.**

See Ex. E (emphasis added).

47. On June 17, 2015 at 9:45 p.m., Hawley sent an e-mail to Myers and University Counsel regarding Request 4844. A true and accurate copy of the June 17, 2015 e-mail from Hawley regarding the Request 4844 is contained in the e-mail exchange attached hereto as Exhibit D and incorporated herein by reference. In the e-mail, Hawley states the following:

Given the interlocking copyright, intellectual property, legal privilege, student privacy, personal privacy, and academic freedom concerns, some of which have federal law and federal constitutional dimensions, it seems to me that the University **may want to think very hard before turning over materials from individual faculty not related to University administration or governance.**

See Ex. D (emphasis added).

48. On June 18, 2015, at 2:00 p.m., the Custodian again sent a response to Elmer regarding Request 4844 (the "Fourth Interim Response") which stated: "[w]e are now prepared to provide you with an estimate of costs and/or responsive records for each part of your request as set forth below." A true and accurate copy of the Fourth Interim Response is contained within the e-mail exchange attached hereto as Exhibit G and incorporated herein by reference.

49. On June 18, 2015, at 2:03 p.m., just three (3) minutes after sending Elmer the Fourth Interim Request, the Custodian sent Elmer an additional e-mail advising him to ignore that the Fourth Interim Request was designated “Advance Copy.” A true and accurate copy of the June 18, 2015 e-mail from the Custodian advising Elmer to disregard the “Advance Copy” designation is contained within the e-mail exchange attached hereto as Exhibit G. The Custodian went on to state “I didn’t want you [to] think it wasn’t an actual response.” *See* Ex. G.

50. The Fourth Interim Response is the result of revisions made to the Advance Copy, which was circulated to Hawley the day before the Fourth Interim Response was sent. The Fourth Interim Response differs substantially from the Advance Copy. For instance, whereas the Advance Copy provides “[w]e are now prepared to provide you with an estimate of costs and/or responsive records for each part of your request as follows,” the Fourth Interim Response provides:

We are now prepared to provide you with an estimate of costs and/or responsive records for each part of your request as set forth below. We note that the estimates provided reflect our best estimate of the response costs in the event that we determine that the various items of your request seek records that are subject to the Sunshine Law. While providing those estimates and the attached records, **we expressly reserve determination as to whether some items of your request seek records that are not subject to, or may be closed under, the Sunshine Law** and we reserve all rights, including those available under Section 610.027.5, RSMo.

See Exs. E and G (emphasis added). The difference between the Advance Copy and the Fourth Interim Response directly address the complaints raised by Hawley in his e-mail to Myers and University Counsel. *See* Ex. E (“The response to Requests 1-3 imply that the University has determined to turn over all or some of my email correspondence, documents, and phone records.”).

51. The Fourth Interim Response also provided the following estimated costs for the requests set forth in Request 4844:

- a. Request #1: \$3,198.50;
- b. Request #2: \$81.32;
- c. Request #3: \$616.00;
- d. Requests #13, #15, #17, #19, #21 and #23: \$359.40 (collectively); and
- e. Requests #14, #16, #18, #20, #22: \$691.20 (collectively).

See Ex. G. Per the Fourth Interim Response, the estimated cost to produce the Authorized Requests, in the aggregate, is \$4,946.42. *Id.*

52. The Fourth Interim Response further provided that, if Elmer desired for “the University to complete its response to any part of [his] request,” he should “remit a check in the appropriate amount to [the Custodian’s] attention . . . made payable to ‘The Curators of the University of Missouri.’” *Id.*

53. On July 6, 2015, Elmer sent a letter (the “Payment Letter”) to the Custodian with a check for \$4,946.42 (the “Check”) to authorize, and provide payment for, the Authorized Requests. True and accurate copies of the Payment Letter and the Check are attached hereto as Exhibit H and incorporated herein by reference.

54. The Payment Letter further provided:

You have indicated the costs for obtaining these documents is partially due to the labor involved with reviewing the records to ensure closed records are not produced. Pursuant to Section 610.023.4 **I am requesting a written statement citing the specific provision of law under which access is being denied and the grounds for such denial of any documents not produced.**

See Ex. H (emphasis added).

55. On July 8, 2015, the Custodian received the Payment Letter and the Check.

56. On July 9, 2015, the University Counsel sent an e-mail to Myers and Hawley regarding Request 4844. A true and accurate copy of the July 9, 2015 e-mail from University Counsel is contained in the e-mail exchange attached hereto as Exhibit D. The e-mail from University Counsel provided:

Once records have been gathered, they will be reviewed by the custodian with assistance from our office to verify that they are responsive and subject to the Sunshine law, and to determine whether they are open or closed based on the exceptions established in the statute. When records that are believed to be responsive open public records have been identified, you will be given an opportunity to review them before they are provided to Mr. Elmer so you can provide comments on whether any of the records should not be released. After you have had an opportunity to give feedback and any comments you make have been considered, open responsive public records will be provided to Mr. Elmer.

57. On July 9, 2015 at 5:11 p.m., Elmer sent an e-mail to the Custodian asking her to “advise as to when [he] might expect to receive the documents that are responsive to Request #4844 that was made 42 days ago on May 28, 2015.”

58. On July 13, 2015 at 7:46 a.m., Elmer sent an e-mail to the Custodian “to further inquire about the status of the document request #4844, as [he] did not receive a response to his last inquiry.”

59. On July 15, 2015 at 8:01 a.m., the Custodian provided yet another further e-mail response to Request 4844 (the “Fifth Interim Response”) which stated: “we anticipate being able to provide responses to requests 2 and 13 – 24 over the next two and one-half weeks.” A true and accurate copy of the Fifth Interim Response is attached hereto as Exhibit I and incorporated herein by reference.

60. The Fifth Interim Response further provided: “[w]e have not received all of the research information needed for estimating a time frame to gather and review the responsive documents to requests 1 and 3, but we anticipate it **may take up to two months** to provide those

to you because of the large volume and complexity involved.” *See* Ex. I (emphasis added). Two months from the Fifth Interim Response would occur sometime in the month of September, 2015.

61. On July 20, 2015, Hawley sent a letter (the “Procedure Letter”) to the Custodian regarding his “understanding of the procedure for responding to [Request 4844].” A true and accurate copy of the Procedure Letter is attached hereto as Exhibit J and incorporated herein by reference.

62. The Procedure Letter provided:

I understand that **I am to review all emails and documents** currently retained on my University email account, on University server drives accessible by me, and on my office computer for the period running from May 28, 2013 to May 28, 2015. Per your instructions, **I will separate those emails and documents** that involve non-University business from those that pertain to University matters. **I will further identify those emails and documents** pertaining to non-University matters that are legally privileged.

See Ex. J (emphases added).

63. The Procedure Letter further provided:

It is my understanding from our conversation that once **I complete my review of these materials**, the Custodian’s Office and the Office of the General Counsel will collect and review all materials **related to University matters**, and will make appropriate redactions to comply with federal and state law, including FERPA and copyright law. **I will make materials related to non-University matters available for your inspection upon request, on the understanding that the University will consult me before releasing any such material.** It is my understanding that **legally privileged materials will not be reviewed at any time.** I plan to undertake these efforts in accordance with your instructions solely in the interest of cooperating with the University. **I believe that this request for emails and documents from a non-administrator is unauthorized** by Missouri’s Sunshine Law.

Nothing in this letter or my actions should be deemed a waiver of any objection to producing any documents based on privilege, non-responsiveness, undue burden, or any other applicable ground.

Id. (emphases added).

64. Between July 20, 2015 and September 8, 2015, the Custodian provided responsive documents to Requests #2 and #13-24.

65. One day after Hawley filed his Statement of Committee Organization to run for Attorney General, on July 24, 2015, the Board of Curators convened (the “Board of Curators Meeting”) and, among other things, amended section 330.050 of the Collected Rules and Regulations, titled “Political Activities.” It was an obvious reaction to the political activities of Hawley. Hawley, however, was exempted from the University’s policy change to crackdown on political activities. A true and accurate copy of the minutes from the Board of Curators Meeting is attached hereto as Exhibit K.

66. Upon information and belief, prior to filing his campaign committee, Hawley and/or independent counsel retained by Hawley, provided a legal memorandum to the Board of Curators opposing the production of Hawley’s e-mails and the contents of his University computer, as requested by Request 4844, except as provided in the procedure letter and threatened litigation against the University if such procedures were not followed.

67. On August 10, 2015, Elmer sent a letter to the Custodian regarding Request 4844. A true and accurate copy of the August 10, 2015 letter is attached hereto as Exhibit L and incorporated herein by reference. In his letter Elmer wrote the following:

On July 15, 2015 you acknowledged receipt of the \$4,946.26 check I sent you for payment of the costs associated with my request of May 28, 2015. At that time you stated, “(w)e have not received all of the research information needed for estimating a time frame to gather and review the responsive documents to requests 1 and 3, but we anticipate it may take up to two months to provide those to you because of the large volume and complexity involved.”

The statement you provided is inconclusive on providing a date when the requested documents will be available. It has been almost four weeks since our last correspondence concerning this issue. Therefore, I am requesting pursuant to

RSMo. 610.023(3) that you please clarify when the requested documents will be produced.

See Ex. L (emphasis added).

68. Notwithstanding Elmer's request set forth in his August 10, 2015 letter, between September 8, 2016 and January 12, 2016, no actions were taken by the Custodian to provide documents responsive to Request #1 and Request #3 set forth in Request 4844.

69. On January 12, 2016, Elmer spoke with non-party Steve Knorr, Vice President of University Relations for the University, regarding Request 4844. In particular, Elmer stated that, in light of the Custodian's continued failure and refusal to provide documents responsive to Request 4844, Elmer would soon be forced to file litigation to enforce the Missouri Sunshine Law.

70. On February 5, 2016, the Custodian provided Part 1 of its production of documents responsive to Request #1 set forth in Request 4844. Part 2 of its production was provided on February 12, 2016. Part 3 of its production was provided on February 18, 2016. Part 4 of its production was provided on February 29, 2016. Part 5 of its production was provided on March 7, 2016. Part 6 of its production was provided on March 14, 2016. Part 7 of its production was provided on March 21, 2016. Part 8 of its production was provided on April 4, 2016. Part 9 of its production was provided on April 12, 2016. Parts 10 and 11 of its production were provided on April 22, 2016. Parts 12 and 13 of its production were provided on May 9, 2016. Parts 14 and 15 of its production were provided on May 18, 2016.

71. In connection with each and every part of its production of documents responsive to Request #1, the Custodian has withheld and/or redacted certain documents upon an assertion of some combination of the following open-record exceptions:

- a. Mo. Rev. Stat. § 610.021(3) (“Hiring, firing, disciplining or promoting of particular employees by a public governmental body when personal information about the employee is discussed or recorded. However, any vote on a final decision, when taken by a public governmental body, to hire, fire, promote or discipline an employee of a public governmental body shall be made available with a record of how each member voted to the public within seventy-two hours of the close of the meeting where such action occurs; provided, however, that any employee so affected shall be entitled to prompt notice of such decision during the seventy-two-hour period before such decision is made available to the public. As used in this subdivision, the term “personal information” means information relating to the performance or merit of individual employees;”);
- b. Mo. Rev. Stat. § 610.021(7) (“Testing and examination materials, before the test or examination is given or, if it is to be given again, before so given again;”);
- c. Mo. Rev. Stat. § 610.021(13) (“Individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such, and the names of private sources donating or contributing money to the salary of a chancellor or president at all public colleges and universities in the state of Missouri and the amount of money contributed by the source;”);
- d. Mo. Rev. Stat. § 610.021(14) (“Records which are protected from disclosure by law;”); and
- e. Mo. Rev. Stat. § 610.021(21) (“Records that identify the configuration of components or the operation of a computer, computer system, computer network, or telecommunications network, and would allow unauthorized access to or unlawful disruption of a computer, computer system, computer network, or telecommunications network of a public governmental body.”).

An explanatory chart, demonstrating which objections have been assertion in connection with certain parts of the Custodian’s production of documents responsive to Request 4844 is attached hereto as Exhibit N and incorporated herein by reference.

72. On April 22, 2016, the Custodian sent an e-mail to Elmer stating that, after Parts 10 and 11, there are still “approximately 30-35 more files of documents” forthcoming, totaling “close to 70,000 pages of emails in total.” A true and accurate copy of the e-mail from the

Custodian on April 22, 2016 is attached hereto as Exhibit M and incorporated herein by reference.

73. The Custodian has produced 13 parts of its production of documents responsive to Request #1 set forth in Request 4844 in approximately thirteen (13) weeks. At the present rate of production, the Custodian will have completed its production of documents responsive to Request #1 by November 18, 2016, long after both the August primary and the November general elections.

74. This is to say nothing of the production of documents responsive to Request #3 set forth in Request 4844. The Custodian has not provided responsive document or even advised Elmer when such documents will be forthcoming.

75. Accordingly, the final production of documents responsive to Request 4844 will occur long after any allegations regarding Hawley's improper comingling of University assets and personal political activities can be scrutinized in connection with the Republican primary and possibly general election for the Attorney General.

76. In light of the continued delays, and the Custodian's enduring failure and refusal to provide documents responsive to Request 4844, Elmer has filed a subsequent open records request pursuant to the Missouri Sunshine Law, which seeks, among other things, (1) information exploring the Custodian's failure to timely provide documents responsive to Request 4844; (2) information regarding the rules, policies, procedures and/or customs that the Custodian has followed and/or disregarded in responding to Request 4844; and (3) follow-up information regarding the documents that have thus far been produced in response to Request 4844. A true and accurate copy of the open records request filed by the undersigned counsel on behalf of Elmer is attached hereto as Exhibit O and incorporated herein by reference.

77. Notwithstanding the foregoing improper attempts to curtail the Custodian's production of documents responsive to Request 4844, the documents which have been produced contain documents which verify, at the very least, that University property was improperly used for campaign purposes by Hawley, and demonstrate the dire need for an expedient and complete production of documents responsive to Request 4844. A compilation of documents, received by Elmer in response to Request 4844, and which demonstrate an improper appropriation of University property for political purposes, are attached hereto as Exhibit P and incorporated herein by reference.

COUNT I – Purposeful Violation of the Missouri Sunshine Law
(Against Custodian and Curators)

For his Count I against the Defendants, Elmer states as follows:

78. Elmer incorporates by reference and reinstates the allegations contained in paragraphs 1 through 77 above.

79. The Missouri Sunshine Law was intended to ensure broad public access to government records.

80. The legislature made clear its intent in enacting the Missouri Sunshine Law, which states, in relevant part:

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.

Mo. Rev. Stat. § 610.011(a) (emphases added).

81. Defendants are purposefully violating the Missouri Sunshine Law and the public policy objectives of the law through their continued delay or refusal to produce public records requested by Elmer.

82. In particular, under the Missouri Sunshine Law provides:

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.

Mo. Rev. Stat. § 610.023.3.

83. The Missouri Sunshine Law also provides that: “[n]o public governmental body shall, after August 28, 1998, grant to any person or entity, whether by contract, license or otherwise, the exclusive right to access and disseminate any public record ...” Mo. Rev. Stat. § 610.023.2. The Procedure Letter makes clear that Hawley was permitted to prevent access by the University to records he deemed “non-University” materials. The Custodian is specifically prohibited from granting such permission. Moreover, there is no support in the Missouri Sunshine Law for exempting documents Hawley deemed not to involve University governance. Indeed, misuse of University property for political purposes is certainly a public record subject to an open records request, and a violation of Missouri law.

84. The one year delay in producing documents responsive to Request 4844 is unreasonable and Defendants do not have reasonable cause for such delay.

85. Defendants have failed to either produce all records or give a detailed explanation of the cause for further delay and provide the time and date that the records will be available and they have moved the deadline for providing the requested documents on multiple occasions.

86. Defendants have unlawfully redacted or closed public documents requested by Plaintiff.

87. Moreover, Defendants waived application of any basis to deny access by failing to cite exemptions it was relying upon within three (3) days as required by Mo. Rev. Stat. § 610.023.4.

88. Pursuant to Mo. Rev. Stat. § 610.027(3), a public governmental body or member who purposefully violates the Missouri Sunshine Law is subject to a civil penalty in an amount up to five thousand dollars plus costs and reasonable attorney's fees to the party establishing such a violation.

89. Defendants purposefully violated the Missouri Sunshine Law for the following reasons:

- a. They failed to respond to Plaintiff's written request for access to public records within three business days after receipt of the written request;
- b. They failed to provide a detailed explanation of the cause for further delay in production of public records;
- c. They failed to show reasonable cause for why the public records could not be produced within three business days;
- d. They failed to state the place and earliest time and date that the public records would be available;
- e. They unreasonably redacted and exempted certain public records requested by Plaintiff;
- f. They failed to provide Plaintiff, after written request, a detailed written statement setting forth the grounds for denial of access to certain public records, including citations to specific provisions of law under which access to each record was denied; and
- g. Charging exorbitant fees to discourage the pursuit of public documents, in contravention with the Missouri Sunshine Law and the core policy behind the Missouri Sunshine Law.

90. Because of the purposeful violation of the Missouri Sunshine Law by Defendants, Elmer is entitled to statutory damages and his attorney fees pursuant to Mo. Rev. Stat. § 610.027(4).

WHEREFORE, Plaintiff Kevin Elmer respectfully requests that the Court enter judgment on Count I in his favor and:

- A. Declare that Defendants purposefully violated the Missouri Sunshine Law;
- B. Enter an injunction requiring Defendants to provide Elmer copies of the records he requested;
- C. Find that Defendants purposefully or, in the alternative, knowingly engaged in numerous violations of the Missouri Sunshine Law;
- D. Impose the maximum civil penalties allowed by law against Defendants to punish Defendants for their numerous violations of the Missouri Sunshine Law and to deter Defendant and others from engaging in like conduct in the future;
- E. Award Elmer any and all attorneys' fees and costs of litigation as authorized by the Missouri Sunshine Law; and
- F. Grant Elmer such other and further relief as this Court deems just and proper under the circumstances.

COUNT II – Unjust Enrichment
(Against Custodian and Curators)

For his Count II against Defendants, Elmer states as follows:

91. Elmer incorporates by reference and restates the allegations contained in paragraphs 1 through 90 above.

92. Elmer paid Defendants the amount of \$4,946.42 for the estimated cost of producing Request 4844 (Requests # 1, 2, 3, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23).

93. Defendants accepted payment and, to date, have not provided Elmer with the documents and data requested, resulting in a loss to Elmer.

94. Defendants appreciated, accepted and retained the monetary benefit conferred upon them by Elmer under circumstances in which retention of payment would be unjust.

WHEREFORE, Plaintiff Kevin Elmer respectfully requests that the Court enter judgment on Count II in his favor and against Defendants Custodian and Curators; award Plaintiff damages in the amount of \$4,946.42, plus any additional amounts to be proven at trial, plus pre- and post-judgment interest; award Plaintiff his reasonable attorneys' fees and costs incurred herein; and grant such other and further relief as this Court deems just and proper.

COUNT III – Civil Conspiracy
(Against All Defendants)

For his Count III against Defendants, Elmer states as follows:

95. Elmer incorporates by reference and restates the allegations contained in paragraphs 1 through 94 above.

96. A claim for civil conspiracy must establish that: (1) two or more persons; (2) with an unlawful objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and (5) the plaintiff was thereby damaged. *Gettings v. Farr*, 41 S.W.3d 539, 542 (Mo. App. E.D. 2001) (citing *Gibson v. Brewer*, 952 S.W.2d 239, 245 (Mo. banc 1997)).

97. In particular, Hawley, Myers, the University and the Custodian conspired to prevent access to public records, which had been requested pursuant to the Missouri Sunshine Law, to conceal (1) the inappropriate use of University property for campaigning and other political purposes; (2) the violation of the University's leave policy; and (3) the support Hawley received, whether financial or otherwise, including but not limited to the granting of tenure from the University, Myers and/or the University of Missouri Law School, in connection with his political activities.

98. Associate Professor Josh Hawley, University of Missouri Law School Dean Gary Myers, the Custodian and the Curators purposefully, or in the alternative, knowingly violated the Missouri Sunshine Law, after conferring via teleconference and e-mail with each other, by withholding public records from Plaintiff that were requested pursuant to a lawful Missouri Sunshine Law request.

WHEREFORE, Plaintiff Kevin Elmer respectfully requests that the Court enter judgment on Count III in his favor and against Defendants Custodian, Curators, Josh Hawley and Gary Myer; award Plaintiff damages in an amount to be proven at trial; award Plaintiff his reasonable attorneys' fees and costs incurred herein; and grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

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