SUPREME COURT OF MISSOURI
en banc

ELAD GROSS,	)	*Opinion issued June 29, 2021*
	)	
Appellant,	)	
	)	
v.	)	No. SC98619
	)	
MICHAEL PARSON, et al.,	)	
	)	
Respondents.	)	

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY
The Honorable Patricia Joyce, Judge

Elad Gross appeals the circuit court's judgment on the pleadings in favor of Governor Michael Parson and the custodian of records for the governor's office, Michelle Hallford (collectively, "the Governor's Office"). The underlying lawsuit filed by Mr. Gross involves two public records requests he made under the Sunshine Law, sections 610.010-.035.[1] Mr. Gross claims the circuit court erred in entering judgment on the pleadings because the Governor's Office violated the Sunshine Law when it: required Mr. Gross to pre-pay an estimate of costs for his first request that included attorney-review time; arbitrarily refused to waive the fees associated with his first request; failed to explain its estimated delay in producing certain requested records; and impermissibly redacted

[1] All statutory citations are to RSMo 2016 unless otherwise noted.

certain records. Mr. Gross claims some or all of these violations were knowing and purposeful. He also alleges the circuit court misapplied the law by assigning him – not the Governor's office – the burden of demonstrating the redaction of portions of the records complied with the Sunshine Law.

For the reasons set forth below, the circuit court's judgment is vacated, and the cause is remanded.

Factual and Procedural Background

In 2018, Mr. Gross sent the Governor's Office two requests for public records pursuant to Missouri's Sunshine Law. In August 2018, Mr. Gross first sought "[a]ny and all records, communications, documents, emails, reports, and other material" sent from or received by the Governor's Office from 27 specific individuals or entities after January 9, 2017, i.e., between January 9, 2017, and the processing of Mr. Gross's request.[2] Mr. Gross says his request was made as part of his investigation into the use of "dark money" by nonprofit organizations in Missouri. Mr. Gross ended his request by noting where responsive documents should be sent and requesting a waiver of all fees related to his request, stating:

> I request that the records responsive to my request be copied and sent to me at the following address: [Mr. Gross's address]
>
> Where records are transmittable electronically, I request records responsive to my request be sent to [Mr. Gross's email] or by CD-ROM at the address above.

[2] Eric Greitens was sworn in as the governor of Missouri on January 9, 2017. He resigned on June 1, 2018. Then-Lieutenant Governor Michael Parson became governor for the remainder of the term, pursuant to article IV, section 11(a) of the Missouri Constitution. Governor Parson was then elected in November 2020 to a full term of office.

> I request that all fees for locating and copying the records be waived. The information I obtain through this request will be used to determine whether specific organizations and individuals violated federal and Missouri laws governing political campaigns. This request is in the public interest due to its law enforcement purpose and because it will reveal whether specific nonprofit organizations are violating Missouri's consumer protection laws and whether legislation is needed to provide transparency in government for the people of Missouri.
>
> Please let me know in advance of any search or copying if the fees will exceed $100.00.

Christopher K. Limbaugh, then-general counsel for the governor, responded to Mr. Gross's first request on August 23, 2018, stating, "We are in the process of gathering the records that are responsive to your request and anticipate that we will be able to provide a response or cost estimate (if applicable) for the records you have requested in approximately one month. We will contact you at that time."

On September 21, 2018, Mr. Limbaugh sent a follow-up response to Mr. Gross's first request, stating:

> We have found 13,659 documents that may be responsive to your request. The estimated cost for providing these records is $3618.40 (please see enclosed invoice). Before we begin preparing the information, please forward to this office a check in that amount, directed to the attention of Michelle Hallford, Custodian of Records, and made out to "State of Missouri — Governor's Office[.]" Once we receive this amount we estimate that it will take at least 120 business days to complete this request. We will send the records to you on a disk.

The invoice attached to the follow-up communication provided Mr. Gross's request would take an estimated 90.46 hours of "research/processing" time at a rate of $40.00 per hour, amounting to $3,618.40 in fees.

Upon receipt of this invoice, Mr. Gross sent Ms. Hallford and Mr. Limbaugh a letter, asking the Governor's Office to reconsider waiving the fees related to his request, stating his request served a public, rather than a commercial, interest. Mr. Gross also requested that the Governor's Office provide a further explanation of the fees charged in the event it declined to waive fees. He informed the Governor's Office of section 610.026 and the requirement that a public governmental body produce copies using the employees that result in the lowest amount of charges and that charges for clerical work cannot exceed the average hourly rate of pay for clerical staff. Additionally, Mr. Gross informed the Governor's Office section 610.023.3 requires that, when a public governmental body fails to grant access to public records immediately, it must give a detailed explanation of the cause for further delay and the place and earliest time and date the records will be available.

On September 24, 2018, Mr. Gross sent a second Sunshine Law request to the Governor's Office, seeking:

> Any and all records, communications, documents, emails, reports, and other material sent by or to Office of the Governor's staff, advisors, contractors, or other agents involving the Office of the Governor's response or plans to respond to the Sunshine Requests sent to the Office of the Governor by Elad Gross dated August 18, 2018.

Mr. Gross again asked the Governor's Office to waive fees related to his request, articulating the same reasons he set forth in his first request. On September 27, 2018, Mr. Limbaugh responded the Governor's Office would provide a response or a cost estimate within 10 days, adding, "We do not anticipate this will be a voluminous request."

On October 12, 2018, the Governor's Office provided records in response to Mr. Gross's second request. The responsive records were separated into two sets. "Set A"

contained 17 pages, two of which were partially redacted. "Set B" contained 40 pages, none of which were redacted. In addition to the responsive documents, the Governor's Office informed Mr. Gross it decided to waive the fees for his second request. The Governor's Office did not, however, provide a further response regarding Mr. Gross's first request.

Rather than tender the estimated fees associated with his first request, Mr. Gross filed a petition in the circuit court on October 17, 2018. In his petition, Mr. Gross alleged the following with respect to his first request: the Governor's Office ignored his request for fee waiver, $40 per hour is an excessive charge under section 610.023.3, the Governor's Office failed to provide a detailed explanation of the cause for delay in producing the records, and the Governor's Office also failed to provide the earliest time and date the requested records would be available, as required by section 610.023.3 (Count I); the Governor's Office knowingly violated the Sunshine Law (Count II); the Governor's Office purposely violated the Sunshine Law (Count III); and the violations warranted injunctive relief (Count IV). With respect to his second sunshine request, Mr. Gross alleged the Governor's Office improperly redacted certain records (Count V); the Governor's Office knowingly violated the Sunshine Law (Count VI); the Governor's Office purposely violated the Sunshine Law (Count VII); and the violations warranted injunctive relief (Count VII).

After filing its answer, the Governor's Office filed a motion for judgment on the pleadings, alleging Mr. Gross's claims fail, as a matter of law. In particular, the Governor's Office alleged Mr. Gross's fee-waiver claim fails because the Governor's Office has

discretion to waive fees; Mr. Gross's excessive-fee claim fails because attorney review time is chargeable to a requester and $40 per hour is the hourly rate of the lowest-paid attorney who works for the Governor's Office; Mr. Gross's claim regarding the inadequate timeline provided by the Governor's Office fails because the 120-day estimate is reasonable given the scope of Mr. Gross's request; no improper redaction occurred because the Sunshine Law "authorizes the redaction of closed information, which includes attorney-client privileged communications"; and Mr. Gross's allegations regarding "knowing" or "purposeful" violations of the Sunshine Law are based only on speculation. On July 8, 2019, the circuit court sustained the motion for judgment on the pleadings and entered judgment in favor of the Governor's Office.

Mr. Gross appealed, and this Court granted transfer after an opinion by the court of appeals. Mo. Const. art. V, sec. 10.

Standard of Review

This Court reviews the circuit court's grant of judgment on the pleadings *de novo*. *Woods v. Mo. Dep't of Corr.*, 595 S.W.3d 504, 505 (Mo. banc 2020). In reviewing the circuit court's ruling, the Court must decide "whether the moving party is entitled to judgment as a matter of law on the face of the pleadings." *Emerson Elec. Co. v. Marsh & McLennan Cos.*, 362 S.W.3d 7, 12 (Mo. banc 2012) (quoting *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 599 (Mo. banc 2007)). "The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion." *Id.* However, "[t]his Court will not 'blindly accept the legal conclusions drawn by the pleaders from the facts.'" *Ocello v. Koster*, 354 S.W.3d 187, 197 (Mo. banc 2011) (quoting *Westcott v. City of*

Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990)). This Court will affirm the judgment if it is supported by any theory, "regardless of whether the reasons advanced by the [circuit] court are wrong or not sufficient." *Rouner v. Wise*, 446 S.W.3d 242, 249 (Mo. banc 2014).

Analysis

On appeal, Mr. Gross claims the circuit court erred in sustaining the Governor's Office's motion for judgment on the pleadings. In 10 points relied on, Mr. Gross offers 10 different legal reasons to support his position. First, he claims the Governor's Office violated the Sunshine Law when it required him to pre-pay an estimate of costs for his first request that included attorney review time. Second, Mr. Gross alleges the Governor's Office violated the Sunshine Law when it failed to provide him with the earliest date upon which the records in his first request would be available. Third, Mr. Gross alleges the Governor's Office violated the Sunshine Law when it failed to provide him with a detailed explanation of why it required at least 120 business days to produce documents in response to his first request. Fourth, Mr. Gross alleges he properly pleaded the Governor's Office violated the Sunshine Law when it redacted certain records in response to his second request without explanation and without closing any records. Fifth, Mr. Gross alleges the circuit court erred in holding he had the burden of demonstrating the Governor's Office did not comply with the Sunshine Law when, under the Sunshine Law, it is the Governor's Office's burden to demonstrate compliance with the law when redacting public records. In his sixth and seventh points, Mr. Gross alleges he adequately pleaded the Governor's Office knowingly violated the Sunshine Law with respect to his first and second requests, respectively. In his eighth and ninth points, Mr. Gross alleges he adequately pleaded the

Governor's Office purposely violated the Sunshine Law with respect to his first and second requests, respectively. Tenth, and lastly, Mr. Gross alleges the Governor's Office abused its discretion in violation of the Missouri and United States constitutions by acting arbitrarily and capriciously in denying his request for a fee waiver or reduction associated with his first request.

Attorney Review Time

In his first point, Mr. Gross alleges the circuit court erred in granting judgment on the pleadings because the Governor's Office violated the Sunshine Law when it required him to pre-pay an estimate of costs for his first request that included attorney review time. Mr. Gross avers the Sunshine Law does not authorize the Governor's Office to charge him for attorney review time.

The parties do not dispute the facts relevant to Mr. Gross's first point. The Governor's Office quoted Mr. Gross a total of $3,618.40, representing 90.46 hours of "research/processing" time, charged at a rate of $40 per hour. The Governor's Office concedes the "research/processing" time listed in the invoice it sent Mr. Gross referred to attorney review time, i.e., the time an attorney spends reviewing responsive documents for the presence of privileged information and work product subject to redaction. The question presented to this Court is whether section 610.026.1 authorizes a public governmental body to charge attorney review time to a member of the public requesting copies of public records.

Mr. Gross claims section 610.026.1 does not authorize a public governmental body to charge for attorney review time because it does not list attorney review time as one of

the fees a public governmental body may charge. Additionally, he claims the public policy of the Sunshine Law would be hindered if a public governmental body were authorized to charge for attorney review time. In support of the circuit court's judgment, the Governor's Office contends section 610.026.1 authorizes a public governmental body to charge a requester for attorney review time because attorney review time is a subset of "research time," which section 610.026.1(1) authorizes. Alternatively, the Governor's Office asserts section 610.026.1(2) authorizes it to charge attorney review time as a subset of "staff time."

This is a question of statutory interpretation reviewed *de novo*. *Wilson v. City of Kan. City*, 598 S.W.3d 888, 894 (Mo. banc 2020). "The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evidenced by the plain text of the statute." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. banc 2018). Section 1.090 instructs the Court to take words and phrases "in their plain or ordinary and usual sense." Accordingly, "[a] word not defined in a statute is given its ordinary meaning pursuant to the dictionary." *Bus. Aviation, LLC v. Dir. of Revenue*, 579 S.W.3d 212, 218 (Mo. banc 2019).

The context in which a word is used determines which of the word's ordinary meanings the legislature intended. *State ex rel. Anheuser-Busch, LLC v. Moriarty*, 589 S.W.3d 567, 570 (Mo. banc 2019).[3] So, to determine a statute's plain and ordinary

[3] For an example of the importance of context, "[c]onsider this sentence: The batter flew out. Without knowing context, one cannot determine whether that sentence describes what happened when the cook tripped while a carrying a bowl of cake mix, or the final act of a baseball game." *Keller v. Marion Cnty. Ambulance Dist.*, 820 S.W.2d 301, 302 (Mo. banc 1991).

meaning, the Court looks to a word's usage in the context of the entire statute, *id.*, and statutes *in pari materia*, *R.M.A. ex rel. Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420, 429 (Mo. banc 2019).[4]

The analysis, as with any question of statutory interpretation, starts with the text of the statute in question, section 610.026.1, which provides:

> 1. Except as otherwise provided by law, each public governmental body shall provide access to and, upon request, furnish copies of public records subject to the following:
>
> (1) Fees for copying public records, except those records restricted under section 32.091, shall not exceed ten cents per page for a paper copy not larger than nine by fourteen inches, with the hourly fee for duplicating time not to exceed the average hourly rate of pay for clerical staff of the public governmental body. Research time required for fulfilling records requests may be charged at the actual cost of research time. Based on the scope of the request, the public governmental body shall produce the copies using employees of the body that result in the lowest amount of charges for search, research, and duplication time. Prior to producing copies of the requested records, the person requesting the records may request the public governmental body to provide an estimate of the cost to the person requesting the records. Documents may be furnished without charge or at a reduced charge when the public governmental body determines that 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 is not primarily in the commercial interest of the requester;
>
> (2) Fees for providing access to public records maintained on computer facilities, recording tapes or disks, videotapes 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 shall include

[4] Additionally, section 610.011.1 provides, "Sections 610.010 to 610.200 shall be liberally construed and their exceptions strictly construed[.]" However, "[n]either an instruction to employ 'strict construction' nor one to employ 'liberal construction' can authorize this Court to add or subtract words from a statute or ignore the plain meaning of the words that are there." *Dickemann v. Costco Wholesale Corp.*, 550 S.W.3d 65, 68 n.5 (Mo. banc 2018).

> only the cost of copies, staff time, which shall not exceed the average hourly rate of pay for staff of the public governmental body required for making copies and programming, if necessary, and the cost of the disk, tape, or other medium used for the duplication. 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 maps, blueprints, or plats. If programming is required beyond the customary and usual level to comply with a request for records or information, the fees for compliance may include the actual costs of such programming.

Pursuant to this section, public governmental bodies must "provide access to and, upon request, furnish copies of public records," but the section also authorizes public governmental bodies to charge a requester certain fees for providing access or furnishing copies of public records.[5] The only authorized fees that might conceivably include attorney review time are fees for "research time," pursuant to section 610.026.1(1), and fees for "staff time," pursuant to section 610.026.1(2).

The Governor's Office claims that, because Mr. Gross's public records request required an attorney to conduct "a careful review and study of responsive documents . . . to determine whether the documents contained privileged communications or work product materials," attorney review time qualifies as "research time."[6] In fairness, among its different meanings "research" can be used to mean a "careful or diligent search" or "studious inquiry or examination." *Research*, WEBSTER'S THIRD NEW INTERNATIONAL

[5] The Governor's Office is a "public governmental body" as defined in section 610.010(4), and records retained by the Governor's Office constitute "public record[s]" as defined in section 610.010(6). Whether the documents responsive to Mr. Gross's request qualify as "public records" under section 610.010(6) is not at issue in this case, so it will not be addressed.

[6] It is telling that the Governor's Office has difficulty describing attorney review time as anything other than that – *review* time – in its brief.

DICTIONARY UNABRIDGED 1930 (3d ed. 2002). Section 610.026.1(1), however, does not authorize a public governmental body to charge a requester for any and all research time. It authorizes a public governmental body to charge a requester for only a subset of research time, research time "required for fulfilling public records requests." Section 610.026.1(1). So the issue is what "research time" is "required for fulfilling public records requests."

The Sunshine Law provides that, except as otherwise provided by law, all public records "shall be open to the public for inspection and copying as set forth in sections 610.023 to 610.026." Section 610.011.2. Moreover, "[p]ublic records shall be presumed to be open unless otherwise exempt pursuant to the provisions of [chapter 610]." Section 610.022.5. The Sunshine Law then authorizes – but does not require – a public governmental body to close public records (unless disclosure is otherwise required by law) to the extent they relate to any one or more of 24 different subjects. *See* sections 610.021(1)-(24). As relevant to this appeal, section 610.021(1) authorizes a public governmental body to close public records "to the extent they relate to . . . [l]egal actions, causes of action or litigation involving a public governmental body and any confidential or privileged communications between a public governmental body or its representatives and its attorneys." If a public governmental body "is in doubt about the legality of closing a particular . . . record . . . [it] may bring suit" at its own expense "or seek a formal opinion of the attorney general or an attorney for the governmental body." Section 610.027.6.

When a public record contains material that is not exempt from disclosure as well as material that is exempt, "the public governmental body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and

copying." Section 610.024.1. Furthermore, "[w]hen designing a public record, a public governmental body shall, to the extent practicable, facilitate a separation of exempt from nonexempt information." Section 610.024.2. This obligation to separate exempt and non-exempt materials exists regardless of any particular request for public records.

Because the Sunshine Law obligates a public governmental body to separate exempt and non-exempt material without regard to any particular records request, attorney review time to determine whether responsive documents contain privileged information is not "[r]esearch time *required for fulfilling* records requests." It is not a public records request that requires the closing of records. A public records request may be fulfilled without any attorney review time. Therefore, section 610.026.1(1) does not authorize a public governmental body to charge attorney review time as research time required for fulfilling records requests.

The only other fee in section 610.026.1 that might include attorney review time is section 610.026.1(2)'s provision for "staff time." The Governor's Office contends "staff time" includes attorney review time because the attorneys reviewing responsive documents are members of its staff. In isolation, the ordinary meaning of the word "staff," – "personnel responsible for the functioning of an institution or the establishment or the carrying out of an assigned task under an overall director or head" – is broad enough to include staff attorneys. *Staff*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 2219 (3d ed. 2002). However, the meaning of "staff time," like any other statutory term, must be determined within the context of the statute as a whole and its cognate sections. *Cosby v. Treasurer of State*, 579 S.W.3d 202, 206 (Mo. banc 2019).

Section 610.026.1 provides a public governmental body "shall provide access to and, upon request, furnish copies of public records[.][7] Subdivision 2 then provides for "[f]ees *for providing access* to public records maintained on computer facilities, recording tapes or disks, videotapes 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." Section 610.026.1(2) (emphasis added). Such fees "shall include only the cost of *copies*, *staff time*, which shall not exceed the average hourly rate of pay for staff of the public governmental body required for making copies and programming, if necessary, and the *cost of the disk, tape, or other medium used for the duplication*." *Id.* (emphasis added). In consequence, "staff time" is the time required to provide "access to public records maintained on computer facilities, recording tapes or disks, videotapes or films, pictures,

[7] Indeed, the Sunshine Law repeatedly refers to public records being open to the public for both inspection and copying. "[A]ll public records of public governmental bodies shall be open to the public for *inspection and copying*." Section 610.011.2 (emphasis added). "[P]ublic records shall be open to the public for *inspection and duplication*." Section 610.015 (emphasis added). "Each public governmental body shall make available for *inspection and copying* by the public of that body's public records." Section 610.023.2 (emphasis added). "Each request for access shall be acted upon as soon as possible." Section 610.023.3. "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*." *Id.* (emphasis added). "If the separation [between exempt and non-exempt materials] is readily apparent to a person requesting to *inspect or receive copies of* the form," the public body must describe the exempted material. Section 610.024.2 (emphasis added). Public governmental bodies keepings records in electronic formats are "encouraged to provide *access* to its public records to members of the public in an electronic format." Section 610.029.1 (emphasis added). Public bodies are also prohibited from entering "into a contract for the creation of or maintenance of a public records database if that contract impairs the ability of the public to *inspect or copy* the public records[.]" *Id.* (emphasis added).

maps, slides, graphics, illustrations or similar audio or visual items," which may include programming, and to make "paper copies larger than nine by fourteen inches."

Attorney review time has no relation to providing "access to public records maintained on computer facilities, recording tapes or disks, videotapes or films, pictures, maps, slides, graphics, illustrations or similar audio or visual items" or making "paper copies larger than nine by fourteen inches." For that reason, section 610.026.1(2) does not authorize the Governor's Office to charge Mr. Gross for time its staff attorneys spend reviewing responsive documents for privileged information.

Because the Sunshine Law does not authorize a public governmental body to charge a requester for attorney review time, the Governor's Office was not entitled to judgment, as a matter of law, from the face of the pleadings. In this respect, the circuit court erred in sustaining the Governor's Office's motion for judgment on the pleadings.

Earliest Date for Document Production

In his second claim, Mr. Gross alleges the Governor's Office violated the Sunshine Law when it failed to provide him with the earliest date records in his first request would be available for inspection. Section 610.023.3 provides, in relevant part:

> 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 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.

(Emphasis added). Mr. Gross claims the Governor's Office violated the plain language of section 610.023.3 when it failed to provide an exact date upon which the requested records would be available and, instead, provided only an estimate that production would take at least 120 business days.

Section 610.026.1(1) provides a requester "may request the public governmental body to provide an estimate of the cost" before producing copies, and section 610.026.2 authorizes a public governmental body to request payment of "such copying fees" prior to making copies. Pursuant to these provisions, Mr. Gross asked the Governor's Office to let him know in advance if the fees associated with his first request would exceed $100. The Governor's Office responded with its estimate that Mr. Gross's request would require 90.46 hours of research and processing time billed at a rate of $40 per hour, totaling $3,618.40. The Governor's Office said that once it had received that amount, it estimated Mr. Gross's request would take 120 business days to complete.

The Governor's Office did not provide the "earliest time and date" the records would be available for inspection because it conditioned its response on Mr. Gross's payment of attorney review time. While the Governor's office was authorized by section 610.026.2 to require advance payment of statutorily authorized copying fees, the Governor's Office was not authorized to request payment of attorney review time prior to making copies. Because the pleadings show the Governor's Office provided Mr. Gross with a time estimate of 120 business days from payment rather than the exact calendar date upon which Mr. Gross could inspect the requested records, the Governor's Office was not entitled to judgment, as a matter of law, from the face of the pleadings. In this respect, the

circuit court erred in sustaining the Governor's Office's motion for judgment on the pleadings.

Failure to Provide Detailed Explanation of 120-Business-Day Estimate

In his third claim, Mr. Gross alleges the Governor's Office violated section 610.023.3 when it advised Mr. Gross it would take at least 120 business days to produce documents responsive to his first request without providing him with a detailed explanation as to why it required at least 120 business days. As quoted above, section 610.023.3 provides, in relevant part:

> 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 access to the public record is not granted immediately, the custodian shall give a detailed explanation of the cause for further delay*.

(Emphasis added). "The word 'shall' generally prescribes a mandatory duty." *State v. Teer*, 275 S.W.3d 258, 261 (Mo. banc 2009).[8]

In this Court, the Governor's Office explains the 120-business-day estimate was reasonable, as a matter of law, because Mr. Gross's request was "voluminous and complex" and the estimate of "120 business days to research and process [the] documents [was] based on a review rate of 150 documents per hour at 10% of th[e] employee's time." This was not apparent from the face of the pleadings, and, while it may have constituted a "detailed

[8] The presence of a penalty provision in the Sunshine Law for knowing and purposeful violations confirms that the law imposes mandatory duties. *See Teer*, 275 S.W.3d at 262 (recognizing that the presence or absence of a penalty provision is a method for determining whether a statute is mandatory).

explanation" of the cause for delay, the Governor's Office did not provide this explanation to Mr. Gross.

Because section 610.023.3 requires a public governmental body to provide a "detailed explanation" when records are not immediately made available and the pleadings do not show the Governor's Office did so, the Governor's Office was not entitled to judgment, as a matter of law, from the face of the pleadings. With respect to Mr. Gross's claim that the Governor's Office violated the Sunshine Law by failing to provide a detailed explanation for the delay associated with his first request, the circuit court erred in sustaining the Governor's Office's motion for judgment on the pleadings.

Pleading Unexplained Redaction Sufficient to Allege Violation

In his fourth claim, Mr. Gross alleges he properly pleaded the Governor's Office violated the Sunshine Law when it redacted certain records in his second request without explanation. When a record contains both exempt and non-exempt material, the governmental body must "separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." Section 610.024.1. "If the separation is readily apparent to a person requesting to inspect or receive copies of the form, the public governmental body *shall* generally describe the material exempted unless that description would reveal the contents of the exempt information and thus defeat the purpose of the exemption." Section 610.024.2 (emphasis added).

In the records produced in response to Mr. Gross's second sunshine request, the redaction of material is readily apparent – a solid black box covers portions of two pages, making those portions impossible to read. The Governor's Office, however, provided

Mr. Gross with no explanation as to why it redacted these portions of the responsive records. It did not state the redacted material was privileged attorney-client information or work product.

In his petition, Mr. Gross alleged the Governor's Office is subject to the Sunshine Law and that he "requested public records subject to disclosure." He also pleaded, "None of [the Governor's Office's] responses to any of [Mr. Gross's] Sunshine Requests indicated that any records responsive to [his] requests were closed" and, further, "[d]espite not closing any records, [the Governor's Office] redacted portions of the records [it] produced to [him]."

Mr. Gross, therefore, pleaded the ultimate facts relevant to his claim: (1) the records of the Governor's Office, a public governmental body subject to the Sunshine Law, were subject to disclosure; (2) the Governor's Office did not allege the records were closed for any reason; and (3) notwithstanding the fact the records were open, the Governor's Office redacted certain portions of those records.[9]

Nonetheless, the Governor's Office, consistent with the circuit court's ruling, says "[t]he mere fact of redaction itself fails to state a violation of the Sunshine [L]aw because redaction is authorized under the Sunshine law." "What is more," the Governor's Office says, "the second Sunshine [L]aw request clearly involved privileged and closed

[9] A "closed record" is defined as "any . . . record . . . closed to the public." Section 610.010(1). When a public governmental body redacts a record, it closes the redacted portion to the public. *See State ex rel. Goodman v. St. Louis Bd. of Police Comm'rs*, 181 S.W.3d 156, 160 (Mo. App. 2005) (concluding "the trial court did not err in authorizing the Board *to close by redaction* [certain] information from the incident reports Goodman requested" (emphasis added)).

communications, since the requested documents involved multiple attorneys." The Governor's Office is correct that the Sunshine Law authorizes redaction in certain circumstances, such as for privileged attorney-client communication. But that general authorization does not mean the redaction that took place in this case was proper. Indeed, not every communication with an attorney is a privileged communication. "To be privileged the communication must relate to attorney-client business and not to extraneous matters." *State v. Fingers*, 564 S.W.2d 579, 582 (Mo. App. 1978). The Governor's Office was not entitled to judgment on the pleadings simply because it noted the Sunshine Law generally permits redaction of attorney-client privileged information. Whether redaction was proper here is a fact question that cannot be resolved on a motion for judgment on the pleadings.

Mr. Gross's pleading sufficiently alleged the Governor's Office violated the law when it redacted records responsive to his second request. In this respect, the circuit court erred in sustaining the Governor's Office's motion for judgment on the pleadings.

Burden of Persuasion Is Premature at Motion for Judgment on the Pleadings

In his fifth claim, Mr. Gross alleges the circuit court misapplied the law when it concluded he had the burden of demonstrating the Governor's Office did not comply with the Sunshine Law when it made the relevant redactions. He cites section 610.027.2, which provides:

> Once a party seeking judicial enforcement of sections 610.010 to 610.026 demonstrates to the court that the body in question is subject to the requirements of sections 610.010 to 610.026 and has held a closed meeting, record or vote, the burden of persuasion shall be on the body and its members

> to demonstrate compliance with the requirements of sections 610.010 to 610.026.

Pursuant to section 610.027.2, "when a governmental body claims that an exception to the general rule of openness applies, the burden of persuasion in a suit seeking disclosure of public records shifts to the governmental body." *Farber v. Metro. Police Dep't of City of St. Lou*is, 558 S.W.3d 70, 73 (Mo. App. 2018). In other words, "[o]nce it is determined that a governmental body is subject to the Sunshine Law and that it has claimed that a record is closed, the burden is on the governmental body to demonstrate that the Sunshine Law does not require disclosure." *Laut v. City of Arnold*, 491 S.W.3d 191, 194 (Mo. banc 2016).

Mr. Gross alleges the circuit court misapplied the law and assigned him the burden of persuasion when it concluded that "[p]leading the fact of redaction, without more, does not raise a plausible inference of violating the [S]unshine [L]aw, because multiple provisions of the statute authorize redaction of documents." This Court agrees. As explained above, Mr. Gross sufficiently pleaded that the Governor's Office redacted records in violation of the law. In requiring Mr. Gross to plead "more," the circuit court effectively required him to prove the redaction was in violation of the law. However, factual proof of a claim is not required on a motion for judgment on the pleadings. Moreover, placing the burden on Mr. Gross is contrary to section 610.027.2, which requires *the public governmental body* to demonstrate its compliance with the Sunshine Law once a requester has demonstrated the governmental body is subject to the Sunshine Law and

closed a record. *Id.*[10] A requester does not have the burden to show noncompliance when an open record is redacted. The circuit court's conclusion that Mr. Gross must have pleaded "more" than unexplained redaction is erroneous.

Knowing Violation Regarding First Request

In his sixth claim, Mr. Gross alleges the Governor's Office knowingly violated the Sunshine Law with respect to his first records request and he sufficiently pleaded the Governor's Office committed knowing violations. The state of mind of a public governmental entity that violates the Sunshine Law "is not a separate violation of the [S]unshine [L]aw." *Roland v. St. Louis City Bd. of Election Comm'rs*, 590 S.W.3d 315, 324 (Mo. banc 2019). Rather, "it simply determines the extent of [a] court's discretion in remedying an established [S]unshine [L]aw violation." *Id.*

"What constitutes a knowing . . . violation of the Sunshine Law is a question of law." *Laut*, 491 S.W.3d at 193. To prove a knowing violation of the Sunshine Law, a party must do more than show that the governmental body knew the actions it was taking; "it requires proof that the alleged violator *knew that the conduct in question violated the*

[10] Because judgment in this case was on a motion for judgment on the pleadings, the argument made by the Governor's Office that Mr. Gross should have "argued for a burden shifting" or "requested *in camera* review of the two redactions in the circuit court" is not meritorious. Mr. Gross alleged facts to support his claim that the Governor's Office violated the Sunshine Law in redacting open public records, and as the non-moving party, his allegations "are treated as admitted for purposes of the motion for judgment on the pleadings." *Woods*, 595 S.W.3d at 505 (alterations omitted). And, even on remand when the case proceeds beyond adjudication of the motion for judgment on the pleadings, Mr. Gross does not need to request the burden be shifted because, by statute, he does not have a burden of persuasion following a demonstration that the Governor's Office is subject to the Sunshine Law and closed a record or a portion of a record. Section 610.027.2. For the same reason, Mr. Gross does not have an obligation to seek *in camera* review.

Sunshine Law." *Id.* at 200 (emphasis in original). "Whether the conduct of the [public governmental body] brings it within the scope of the statutory definitions of knowing . . . conduct is a question of fact." *Id.* at 196. Intent is most often proved by circumstantial evidence and "may be inferred from surrounding facts or the act itself." *Stone v. Mo. Dep't of Health*, 350 S.W.3d 14, 24 (Mo. banc 2011) (quoting *State v. Oliver*, 293 S.W.3d 437, 446 (Mo. banc 2009)).

In his petition, Mr. Gross alleged the Governor's Office knowingly violated the Sunshine Law with respect to his first records request because Mr. Gross informed the Governor's Office of the requirements of the Sunshine Law, it knew the requirements of the Sunshine Law, and yet it "repeatedly refused to abide by the requirements of [the Sunshine Law] with respect to [Mr. Gross's] first Sunshine Request." Mr. Gross incorporated all of the factual allegations in his petition into his count alleging the Governor's Office acted knowingly. The reasonable inference that can be drawn from these allegations and the incorporated facts related to Mr. Gross's first records request is that the Governor's Office violated the law in the ways Mr. Gross alleged and knew it was violating the law when it took the challenged actions (i.e., charged $40 per hour for research/processing time, failed to provide the earliest date records would be available, and failed to provide a detailed explanation of the cause for delay). Mr. Gross has sufficiently alleged the Governor's Office acted knowingly; therefore, the Governor's Office was not entitled to judgment, as a matter of law, from the face of the pleadings. In consequence, the circuit court erred in sustaining the Governor's Office's motion for judgment on the pleadings as to this issue.

Knowing Violation Regarding Second Request

In his seventh claim, Mr. Gross alleges the Governor's Office knowingly violated the Sunshine Law with respect to his second sunshine request when it redacted two records it provided to him. Mr. Gross also claims he sufficiently pleaded that a knowing violation occurred. The Governor's Office alleges its redactions were proper and Mr. Gross failed to plead otherwise sufficiently. The circuit court held Mr. Gross did not plead any facts "support[ing] even an inference that the Governor's Office engaged in any conduct to knowingly . . . violate the Sunshine Law." This conclusion was erroneous.

A plaintiff must plead ultimate facts in order to satisfy Missouri's fact-pleading standard. *See Tuttle*, 590 S.W.3d at 311 n.8. In his petition, Mr. Gross pleaded that the Governor's Office, without explanation and without closing records, redacted portions of the records it produced to him in violation of the Sunshine Law, despite knowing the requirements of the Sunshine Law and despite the fact the records were subject to disclosure. The reasonable inference raised by these allegations is that the Governor's Office knew it could not redact records without explanation. Mr. Gross alleged it did so anyway. These allegations are sufficient to plead a knowing violation of the Sunshine Law.

Whether the Governor's Office can meet its burden to demonstrate it did not violate the Sunshine Law when it redacted records is not a matter that can be resolved at this stage. As noted above, "[w]hether the conduct of the [public governmental body] brings it within the scope of the statutory definitions of knowing . . . conduct is a question of fact" for the factfinder. *Laut*, 491 S.W.3d at 196. The Governor's Office was not entitled to judgment, as a matter of law, from the face of the pleadings on Mr. Gross's claim that the Governor's

Office knowingly violated the Sunshine Law with respect to his second sunshine request. The circuit court erred in sustaining the Governor's Office's motion for judgment on the pleadings in this regard.

Purposeful Violation of the Sunshine Law

In his eighth and ninth claims, Mr. Gross alleges the circuit court erred in sustaining the Governor's Office's motion for judgment on the pleadings with respect to Counts III and VII of his petition. Count III alleges the Governor's Office purposely violated the Sunshine Law with respect to his first request, and Count VII alleges the Governor's Office purposely violated the Sunshine Law with respect to his second request.

Again, the state of mind of a governmental entity is not a separate count, but "simply determines the extent of [a] court's discretion in remedying an established [S]unshine [L]aw violation." *Roland*, 590 S.W.3d at 324. "What constitutes a . . . purposeful violation of the Sunshine Law is a question of law." *Laut*, 491 S.W.3d at 193. A public governmental body purposely violates the Sunshine Law when it "exhibit[s] a 'conscious design, intent, or plan' to violate the law and do[es] so 'with awareness of the probable consequences.'" *Id.* at 199 (quoting *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. banc 1998)).

To plead a purposeful violation, Mr. Gross had to allege "ultimate facts—facts the jury must find to return a verdict for the plaintiff." *Tuttle*, 590 S.W.3d at 311 n.8 (internal quotations omitted). With respect to his first records request, Mr. Gross alleges the following violations: the Governor's Office charged him for "research/processing" at a rate of $40 per hour, but none of the Governor's Office's clerical staff is paid at that rate;

the Governor's Office failed to provide Mr. Gross with a detailed explanation of the cause for delay in producing records; and the Governor's Office failed to provide Mr. Gross with the earliest date records would be available. Further, Mr. Gross alleges the Governor's Office "repeatedly refused to abide by the requirements" of the Sunshine Law in order to "delay the release of information that may implicate the Office of the Missouri Governor in a scheme to circumvent Missouri campaign finance laws" and "delay the release of information that may implicate donors to Attorney General Josh Hawley's campaign for United States Senate in a scheme to circumvent Missouri campaign finance laws."

With respect to his second sunshine request, Mr. Gross alleges the Governor's Office violated the Sunshine Law when it redacted open public records. Further, he alleges the Governor's Office purposely violated the Sunshine Law when it redacted the records "to avoid providing information pertinent to [Mr. Gross's] investigation into government corruption." These allegations sufficiently allege the Governor's Office had an intent to violate the law. The Governor's Office was not entitled to judgment, as a matter of law, on the face of the pleadings; therefore, the circuit court erred in sustaining the Governor's Office's motion for judgment on the pleadings in regard to Counts III and VII of Mr. Gross's petition.

Constitutional Claim

In his tenth and final claim, Mr. Gross alleges the Governor's Office violated "Missouri statutory and case law, the Missouri Constitution, and the United States Constitution" and "abused its discretion by acting arbitrarily and capriciously in denying [his] request for [the Governor's Office] to waive or reduce fees associated with his first

Sunshine Request." While his point relied on mentions "Missouri statutory and case law," Mr. Gross's argument alleges only constitutional violations. He claims the Governor's Office, by denying his request for fee waiver or reduction, acted arbitrarily and capriciously in violation of the due process and equal protection clauses of the Missouri and United States constitutions. However, Mr. Gross did not raise any constitutional issues in the circuit court. "[T]o preserve constitutional questions for review on appeal, the constitutional issue must be raised in the trial court at the earliest opportunity, consistent with good pleading and orderly procedure." *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 701 (Mo. banc 2008). "This rule is necessary to prevent surprise to the opposing party and to allow the trial court the opportunity to identify and rule on the issue." *Id.* Because Mr. Gross failed to raise this issue in the circuit court and never sought to amend his pleadings, his constitutional claims have not been preserved for appellate review.

Conclusion

The Governor's Office was not entitled to judgment, as a matter of law, from the face of the pleadings. Accordingly, the circuit court's judgment is vacated, and the cause is remanded.

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PATRICIA BRECKENRIDGE, JUDGE

Draper, C.J., Wilson, Russell,
Powell and Fischer, JJ., concur.
Ransom, J., not participating.