

# DON'T GET BURNED BY THE SUNSHINE

A PONDEROUS COLLECTION OF MATERIALS  
RELATING TO CHAPTER 610, RSMo.  
(Including 106 – count 'em 106 - footnotes)

*MOSTLY STOLEN FROM OUR PARTNER, PAUL E. MARTIN  
WHO, IN TURN, HAD STOLEN IT FROM THE PUBLIC DOMAIN*

St. Louis County Municipal League

Creve Coeur, Missouri

August 12, 2004

Arthur: Do you know what I'm going to do? I'm going to take a bath.

Hobson: I'll alert the media.

From the movie *Arthur* (1981), Orion Pictures Corporation

Cities that passed ordinances implementing the Sunshine Law will need to amend that ordinance to reflect these changes. Similarly, those that adopted resolutions relating to the law will need to amend those resolutions.

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**THE SUNSHINE LAW, 2004 EDITION**  
THE LAW PERTAINING TO OPEN MEETINGS AND RECORDS AS FOUND  
IN CHAPTER 610 OF THE REVISED STATUTES OF MISSOURI

August 12, 2004

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**I. INTRODUCTION**

The "Sunshine Law" generally refers to Missouri's Open Meetings and Records Act as found in Sections 610.010 through 610.035 of the Revised Statutes of Missouri. The name is sometimes also used (erroneously) in the context of statutes governing accessibility to arrest records. These provisions are found in Sections 610.100 through 610.200, RSMo., and this article addresses both statutory schemes.

**II. THE SUNSHINE LAW**

Missouri's Open Meetings and Records Act fundamentally requires that records and meetings of public bodies be open to the public. The Act presumes in the first instance that all public business is to be open to public attendance and inspection. It requires an affirmative act on the part of a governmental body to exclude the public by closing a given meeting or record, and such closure is strictly limited to specific statutory exemptions. The Act is to be liberally

construed in favor of public access and against closure.<sup>1</sup> The Missouri Supreme Court has noted that the statute's stated public policy "should be used as a tiebreaker in favor of disclosure."<sup>2</sup>

## **1. APPLICABILITY**

The Sunshine Law applies to all "public governmental bodies." The term "public governmental body" is broadly defined to include "any legislative, administrative or governmental entity created by the constitution or statutes of this state, by order or ordinance of any political subdivision or district, judicial entities when operating in an administrative capacity, or by executive order."<sup>3</sup> This essentially includes all state and local governmental entities, including the Missouri legislature, boards of aldermen and trustees, city councils, the governing boards of public schools, hospitals, fire protection road and other special districts, and all committees, commissions, boards, agencies, and officers that are part of a covered governmental entity.

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<sup>1</sup> 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 610.028 shall be liberally construed and their exceptions strictly construed to promote this public policy. 610.011.1, RSMo. 2000. All statutory citations in this material, unless otherwise noted, are to RSMo. 2000, as amended. All 2004 Amendments refer to C.C.S.H.S.H.C.S.S.B. 1020, 889 and 869 and are effective August 28, 2004, if approved by the Governor.

<sup>2</sup> Guyer v. City of Kirkwood, 38 S.W.3d 412, 414 (Mo. banc 2001).

<sup>3</sup> Section 610.010(4)

Since governmental "bodies" can only act through their constituent members, the law necessarily applies to individuals as well.<sup>4</sup>

In most cases the legal characterization of a "public governmental body" is obvious, but the Sunshine Law also reaches "quasi-public" governmental bodies. These are defined as entities authorized to do business in Missouri under Chapters 352 (Religious and Charitable Associations), 353 (Urban Redevelopment Corporations) and 355 (Not-For-Profit Corporations) of the Revised Missouri Statutes. "Quasi-public" governmental entities also include unincorporated associations designed for the purpose of entering into government contracts or which perform certain specified public functions.<sup>5</sup>

## **2. REQUIREMENTS**

### **A. Meetings**

The law covers all "meetings" at which "public business is discussed, decided, or public policy formulated," including meetings conducted by electronic means or telecommunications.<sup>6</sup> "Public business" is defined as "all matters that relate in any way to the

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<sup>4</sup> See Section 610.028. And in some cases an individual can constitute a "public governmental body." See Charlier v. Corum, 794 S.W.2d 676 (Mo. App. 1990); Tipton v. Barton, 747 S.W.2d 325 (Mo. App. 1988).

<sup>5</sup> Section 610.010(4)(f)

<sup>6</sup> Section 610.010(5).

performance of the public governmental body's functions or the conduct of its business."<sup>7</sup> Prior to the adoption of the definition the term had been construed as encompassing those matters over which a governmental body had supervision, control, jurisdiction or advisory power, and at least one court has opined that "public business" is not necessarily synonymous with "public interest."<sup>8</sup>

Missouri appellate courts have determined that a meeting subject to the Sunshine Law must consist of at least a quorum of the members belonging to the applicable governmental body.<sup>9</sup> A series of one-on-one telephone conversations to gather information, rather than to conduct a poll or a vote, do not constitute "meetings" under the Sunshine Law.<sup>10</sup> Neither was the law intended to encompass every meeting between a constituent and a member of a public governmental body.<sup>11</sup> It can, however, extend to the deliberative portion of a public meeting when the governmental acts in a quasi-

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<sup>7</sup> §610.010(1)

<sup>8</sup> Kansas City Star v. Fulson, 859 S.W.2d 934, 940 (Mo. App. 1989).

<sup>9</sup> Colombo v. Buford, 935 S.W.2d 690, 700 (Mo. App. 1996)(quorum of school board members needed to establish a "public governmental body" under Sunshine Law); Defino v. Civic Center Corp., 780 S.W.2d 665, 671 (Mo.App. 1989)(Sunshine Law does not reach lobbying of aldermen when no quorum is present).

<sup>10</sup> Colombo v. Buford, 935 S.W.2d at 700 *supra*.

<sup>11</sup> DeFino v. Civic Center Corp., 780 S.W.2d 665, 671, *supra*.

judicial capacity.<sup>12</sup> Note also that the statute exempts "an informal gathering of members . . . for ministerial or social purposes when there is no intent to avoid the purposes" of the Sunshine Law.<sup>13</sup> Thus, an informal social gathering does not trigger application of the notice and public access requirements, so long as the social gathering is not an excuse to avoid the statutory requirements.<sup>14</sup>

A public governmental body must provide advance information to the public of any meeting by posting notice of the time, date and place, and a tentative agenda. The notice must be posted at least twenty-four hours in advance (exclusive of weekends and holidays). If the meeting is by internet or electronic means, the public body shall post a notice on its website in addition to its office, notifying the public how to access.<sup>15</sup> Emergency meetings may be held, in which case notice must be posted as soon as possible, but an explanation of the emergency must be included in the minutes. The notice is to be posted on a bulletin board easily accessible to the public and designated for that purpose at the building in the main office of the governmental body holding the meeting. Copies of the notice must also be provided

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<sup>12</sup> See Remington v. City of Boonville, 701 S.W.2d 804 (Mo. App. 1985)(meeting of City's Board of Adjustment involving deliberations while acting in a quasi-judicial capacity subject to the "open meeting" requirements of the Sunshine Law).

<sup>13</sup> Section 610.010(5).

<sup>14</sup> Kansas City Star v. Fulson, 859 S.W.2d 934 (Mo. App. 1989).

to any requesting news media. Public meetings must be held at a place with sufficient size to accommodate the anticipated public. Notice of telephone meetings must identify a method of public access at a designated place.<sup>16</sup> A meeting held by communication equipment is also a public meeting, including conference call, video conference, internet chat or internet message board.<sup>17</sup>

A public body shall allow for recording so long as it does not disrupt the meeting. No recording of a closed session shall be made without permission of the public body. A violation is a class C misdemeanor.<sup>18</sup>

If a governmental body wishes to hold a closed meeting it can do so only in two ways: (1) by a majority vote of a quorum of the body at a public meeting, with the vote of each member and a specific reference to the statutory closure exception being incorporated in the open meeting minutes, or (2) by posting the same twenty-four hour notice required for other meetings, including a reference to the specific statutory exception allowing the closed meeting.<sup>19</sup> The closed meeting can only address the subjects specified in the closed meeting notice.

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<sup>15</sup> Section 610.020 R.S.Mo. 2004 Amendments.

<sup>16</sup> Section 610.020.1 and 610.020.2.

<sup>17</sup> Section 610.010(5) R.S.Mo. 2004 Amendments.

<sup>18</sup> Section 610.020(3) R.S.Mo. 2004 Amendments.

<sup>19</sup> Sections 610.022.1 and 610.022.2.

The public must be allowed to remain at the meeting place during any closed session, so as to be able to attend any subsequent open session.<sup>20</sup>

B. Records

A "public record" generally encompasses any written or electronic record held by a governmental body, including information contained in computer files, recording discs, audio and video tapes, films, photographs, slides, graphics "or similar audio or visual items or devices."<sup>21</sup> Note that the definition excludes the "work product" of an individual member of the body, provided that product has not been retained by the body itself or otherwise disseminated to the public.<sup>22</sup> Records of private contractors retained by or on behalf of a public governmental body are public records.<sup>23</sup> Except for records that have been "closed" in accord with the limited statutory exemptions, records are to be made available upon written request for inspection and copying.<sup>24</sup> Action to close records after the receipt of an appropriate

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<sup>20</sup> Section 610.022.3.

<sup>21</sup>□□□Section 610.026.1(2). If records are maintained in electronic format, the body is "strongly encouraged" to provide public access in such format. §610.029. Also note that Senate Bill 712 relating to terrorism, passed and signed into law in 2002, amended §610.021 by allowing the closure of computer data, public facilities information and personal information that might tend to compromise public or personal safety or security.

<sup>22</sup> Section 610.011(6).

<sup>23</sup> Section 610.010(6) R.S.Mo. 2004 Amendments.

<sup>24</sup> Section 610.011.2; 610.022.5.

disclosure request may be futile.<sup>25</sup> And the governmental body is obligated to redact exempt closed information from a record otherwise subject to disclosure.<sup>26</sup>

Each governmental body is required to designate an official custodian of its records. Each request for access to a record is to be acted upon "as soon as possible" but in any event not later than three business days after the request is made to the designated custodian.<sup>27</sup> If access to the requested record is not granted immediately, the custodian must provide a "detailed explanation" for the delay and state the "earliest time and date" when access will be provided.<sup>28</sup> The delay can exceed three business days for reasonable cause. If access is denied, the custodian, upon request, must provide a written statement of the grounds for denial, including reference to a specific provision of the law permitting closure of the document in question. The statement must be provided within three business days of the request.<sup>29</sup>

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<sup>25</sup> See Tipton v. Barton, 747 S.W.2d 325 (Mo. App. 1988)(record closure occurring nearly a month after request for information failed to comply with Sunshine Law's procedural requirements.).

<sup>26</sup> Section 610.024; State ex rel. Missouri Local Government Retirement System v. Bill, 935 S.W.2d 659 (Mo. App. 1996).

<sup>27</sup> Section 610.023.

<sup>28</sup> Section 610.023.3.

<sup>29</sup> Section 610.023.4.

The governmental body may charge fees for searching for and producing requested records, but fees may not exceed the actual costs incurred in responding to the request. Paper copy charges may not exceed ten cents per 9 x 14 inch page plus average hourly rate of pay for clerical staff.<sup>30</sup> Payment may be required in advance. Upon request, the body must certify that the actual cost of document search and duplication "is fair, reasonable and does not exceed the actual cost incurred."<sup>31</sup>

C. Votes

The Sunshine Law requires that all public votes taken by a public governmental body shall be open to the public and recorded. Votes include telephone or other electronic means.<sup>32</sup> If the vote is by roll call then the record must attribute each "aye," "nay" or abstention to the member so voting. Any votes taken during a closed session must be taken by roll call.<sup>33</sup> For public bodies consisting of elected (as opposed to appointed) members, and committees of those elected bodies, members attending by electronic means are generally not allowed to vote in roll call votes. However, in emergency situations,

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<sup>30</sup> Section 610.026 R.S.Mo. 2004 Amendments.

<sup>31</sup> Sections 610.026.1 and 610.026.2.

<sup>32</sup> Section 610.100(7) R.S.Mo. 2004 Amendments.

<sup>33</sup> Section 610.015.

votes can be taken by fax, phone, or internet, if the emergency pertains to “an emergency of the public body” and if the emergency is described in the minutes.<sup>34</sup>

D. Written Policy

A governmental body is required to have a written policy regarding compliance with the Sunshine Law, and make that policy available to the public.<sup>35</sup> Every public official should review and be familiar with the written policy for the governmental entity, especially since government officials who act in accord with that policy are protected from liability for violating the Sunshine Law.<sup>36</sup> There is a strong policy in favor of allowing the public to access records in convenient electronic format.<sup>37</sup>

E. E-Mail

The 2004 amendments clarify that if a member of a public body transmits a message to two or more other members so that with the sender the number constitutes a quorum of that body, the message must be sent to the member’s public computer or the public body’s custodian.<sup>38</sup>

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<sup>34</sup> Section 610.015 R.S.Mo. 2004 Amendments.

<sup>35</sup> Section 610.028.2.

<sup>36</sup> Section 610.028.2.

<sup>37</sup> Section 610.029 R.S.Mo. 2004 Amendments.

<sup>38</sup> Section 610.025 R.S.Mo. 2004 Amendments.

### **3. CLOSED MEETINGS, RECORDS AND VOTES**

Section 610.021 establishes the exceptions to the presumption of public access to meetings and records and specifies the limited range of matters as to which meetings and records may be closed. The statute lists over twenty categories of permissible closure.<sup>39</sup> The ones most relevant to governmental bodies are excerpted from the statute and categorized below. Note that a closed meeting need not be limited to the government body and its authorized representatives. It may include knowledgeable members of the general public who can provide relevant confidential information to the body on the issue in question.<sup>40</sup>

#### **A. Legal Matters, Settlements and Audits**

Meetings and records pertaining to legal actions, causes of action or litigation involving a public governmental body may be closed, and any confidential or privileged communications between a public governmental body or its representatives and its attorneys may be conducted in closed session. Note that this exception applies to potential, as well as pending, litigation,<sup>41</sup> and the language of the

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<sup>39</sup> Section 610.021 was amended in 2002 by Senate Bill 712 relating to terrorism. It added three new sections allowing the closure of computer data, public facilities information and personal information that might tend to compromise public or public safety or security.

<sup>40</sup> See Smith v. Sheriff, 982 S.W.2d 775 (Mo. App. 1998).

<sup>41</sup> See Tuft v. City of St. Louis, 936 S.W.2d 113 (Mo. App. 1996).

provision broadly encompasses "any" confidential or privileged attorney-client communications. Legal work product also is considered a closed record.<sup>42</sup>

Attorney-client discussions pertaining to the settlement of any legal action, cause of action or litigation may be closed. However, any minutes, vote or settlement agreement must be "made public upon final disposition of the matter voted upon or upon the signing by the parties of the settlement agreement." Disclosure is required even if a case is settled by the governmental entity's insurance carrier.<sup>43</sup> And note that the Sunshine Law insulates public entities from liability for disclosing an otherwise "confidential" settlement agreement.<sup>44</sup>

The only exception to disclosure of a settlement is by court ordered closure, which must be obtained prior to final settlement disposition and after a written finding that the adverse impact to a plaintiff or plaintiffs clearly outweighs the public policy considerations of the Sunshine Law. Even in this case, however, the amount of the settlement must be disclosed. If the case involves the exercise of the

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<sup>42</sup> Section 610.021(1).

<sup>43</sup> Section 610.021(1).

<sup>44</sup> See Calvert v. Mehlville R IX School District, 44 S.W.3d 455 (Mo. App. 2001), in which the court held that the school district did not violate the confidentiality clause of a settlement agreement because Section 610.021(1) required that the district disclose the vote settling the lawsuit. Note that the statute was amended effective in 2000 to require the disclosure of settlement agreements, in addition to the final vote thereon.

power of eminent domain, the vote shall be announced or become public immediately following the body's authorization to institute legal action.<sup>45</sup>

Meetings and records pertaining to confidential or privileged communications between a public governmental body and its auditor can also be closed, and this includes all auditor work product.<sup>46</sup>

B. Real Estate

Discussions and records addressing the lease, purchase or sale of real estate routinely demand closure because public knowledge of the transaction might adversely affect the legal consideration. The governmental entity bears the burden of justifying closure because of consideration concerns.<sup>47</sup> However, if a transaction is consummated, the body's "minutes, vote or public record approving" the contract "shall be made public within seventy-two hours" after execution of the documents establishing the particular transaction.<sup>48</sup> But note that a governmental body may be able to use its discretion to determine what constitutes a "single transaction" for closure purposes if several

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<sup>45</sup> Section 610.021(1).

<sup>46</sup> Section 610.021(17).

<sup>47</sup> See Spradlin v. City of Fulton, 982 S.W.2d 255 (Mo. banc 1998).

<sup>48</sup> Section 610.021(2).

parcels of property are to be acquired as part of a unified transaction.<sup>49</sup>

C. Personnel And Employee Group Negotiations

Personnel discussions and records can be closed within the context of hiring, firing, disciplining or promoting a particular employee when information relating to the performance or merit of the employee is discussed or recorded. The purpose of this exception is to encourage uninhibited discussion of the qualifications and conduct of those who act on behalf of the public governmental body. At least one court has suggested that the exception extends beyond the traditional notion of employees by applying it to an independent contractor.<sup>50</sup> The Missouri Attorney General has also opined that the exception does not extend to discussions relating to the appointment of either elected officials, whether paid or not, or unpaid members of committees or citizen boards.<sup>51</sup>

However, note that any final vote taken to hire, fire, promote or discipline an employee shall be "made available with a record of how each member voted to the public within seventy-two hours of the close

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<sup>49</sup> See City of St. Louis v. City of Bridgeton, 806 S.W.2d 717 (Mo. App. 1991).

<sup>50</sup> Section 610.021(3). See Paskon v. Salem Memorial Hosp. District, 806 S.W.2d 417 (Mo. App. 1991).

<sup>51</sup> See Op. Attny. Gen No. 77-92.

of the meeting where such action occurs." The statute further dictates that the affected employee "shall be entitled to prompt notice of such decision during the seventy-two-hour period before such decision is made available to the public."<sup>52</sup>

The statute also allows closure of "individually identifiable personnel records, performance ratings or records pertaining to employees or applicants for employment." This exception appears broad enough to encompass an employee's entire personnel file. Note, however, that the "personnel records" exception does not protect from disclosure incident and investigative reports generated by a law enforcement agency, even though such reports are retained in an employee's personnel file.<sup>53</sup> Note also that the exemption does not apply to an employee's name, position, salary or length of service with the public governmental body.<sup>54</sup>

While not limited strictly to personnel, another exception allows the closure of meetings and records pertaining to "mental or physical health proceedings involving identifiable persons," including alcoholism and drug dependency.<sup>55</sup> Such information often is generated through

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<sup>52</sup> Section 610.021(3).

<sup>53</sup> See Guyer v. City of Kirkwood, 38 S.W.2d 412 (Mo. banc 2001).

<sup>54</sup> Section 610.021(13). Neither does it protect employment contracts from disclosure. See North Kansas City Hosp. Bd. Or Trustees v. St. Luke's Northland Hosp., 984 S.W.2d 113 (Mo. App. 1998).

<sup>55</sup> Section 610.021(5).

the employment relationship and should be closed under this exception. In fact federal law, such as the Americans With Disabilities, may also impose strict confidentiality requirements with regard to such information.

Any discussions or work product conducted or created in preparation of negotiations with employee groups is also subject to closure.<sup>56</sup>

D. Specifications And Bids

Discussions and records relating to specifications for competitive bidding may be closed until such time as the specifications are officially approved by the public governmental body or the specifications are published for bid.<sup>57</sup> Similarly, sealed bids and related documents must remain closed until the bids are opened, and sealed proposals and related documents or any documents related to a negotiated contract can be closed until a contract is executed or all proposals are rejected.<sup>58</sup>

E. Other Closable Subjects

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<sup>56</sup> Section 610.021(9).

<sup>57</sup> Section 610.021(11).

<sup>58</sup> Section 610.021(12).

The Sunshine Law includes a "catch-all" provision for all records that are otherwise protected from disclosure by law.<sup>59</sup> Also, meetings and public records relating to scientific and technological innovations in which the owner has a proprietary interest are subject to closure.<sup>60</sup> Individual school records can be closed to all except a parent or lawful custodian.<sup>61</sup> Testing materials used by any governmental body may be closed before the test is given, and such materials may also be closed if the same test is to be given again.<sup>62</sup> Note that the Sunshine Law's policy of disclosure extends even to personally identifiable information, such as the names and addresses of residents, absent a reasonable expectation of privacy.<sup>63</sup> The 2004 amendments address terrorist concerns and security systems.<sup>64</sup>

#### **4. VIOLATIONS AND DEFENSES**

Any aggrieved person may seek judicial enforcement of the Sunshine Law. The party must establish that the body in question is subject to the requirements of the law and has held a closed meeting,

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<sup>59</sup> Section 610.021(14).

<sup>60</sup> Section 610.021(15).

<sup>61</sup> Section 610.021(6).

<sup>62</sup> Section 610.021(7).

<sup>63</sup> See City of Springfield v. Events Publishing Co., 951 S.W.2d 366 (Mo. App. 1997).

<sup>64</sup> Section 610.020(18), (19) R.S.Mo. 2004 Amendments.

record or vote, after which the body and/or its members must demonstrate compliance with the statute. Upon a finding that a governmental body has knowingly violated the requirements of the law, the court may impose a civil penalty (up to \$1,000.00 in 2004 Amendments) and may award costs and attorney fees to the party bringing suit.<sup>65</sup> A body or member who "purposely violates" the Sunshine Law must be shown to exhibit a conscious design, intent or plan, with awareness of the probable consequences.<sup>66</sup> A purposeful violation may be subject to a \$5,000.00 civil penalty plus the Court shall order payment of the attorney's fees of the successful plaintiff.<sup>67</sup>

In addition to the possible financial penalties, the court must also void any action taken in violation of the law if it finds that the public interest in enforcement outweighs the public interest in sustaining the validity of the action taken in the closed meeting, record or vote.<sup>68</sup> Injunctive relief is also available to enforce the provisions of the Sunshine Law.<sup>69</sup> Suits for the enforcement of the Sunshine Law must be brought within one year from the date the violation is ascertainable, and in no event later than two years after the

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<sup>65</sup> Section 610.027(1-4).

<sup>66</sup> Spradlin v. City of Fulton, 982 S.W.2d 255, 262 (Mo. banc 1998).

<sup>67</sup> Section 610.027(4) R.S.Mo. 2004 Amendments.

<sup>68</sup> Section 610.027(1-4).

<sup>69</sup> Section 610.030.

violation.<sup>70</sup> A member who objects to closing a meeting and votes against closure is entitled to an absolute defense to Sunshine lawsuits, even if he or she participates in the closed meeting.<sup>71</sup>

A governmental body that is in doubt about closing a meeting or record may seek a formal legal opinion from the Missouri Attorney General or the governmental body's attorney, or file a court action at its own expense to ascertain the propriety of doing so.<sup>72</sup> If the body files a declaratory judgment action, its "expense" includes liability for the attorney's fees of the opposing party, seemingly without regard to the outcome of the action.<sup>73</sup> A governmental body may provide a legal defense for any member charged with violation of the law, and any such member who follows the body's duly-adopted open meetings and records policy cannot be found guilty of a statutory violation.<sup>74</sup> No person who in good faith reports a violation of the Sunshine Law may be subject to civil liability or to any adverse job consequence.<sup>75</sup> No

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<sup>70</sup> Section 610.027.4.

<sup>71</sup> Section 610.022(6) R.S.Mo. 2004 Amendments.

<sup>72</sup> Section 610.027(5).

<sup>73</sup> See Hemeyer v. KRCG-TV, 6 S.W.3d 880 (Mo. banc 1999).

<sup>74</sup> Section 610.028.1 and 610.028.2.

<sup>75</sup> Section 610.028.3.

custodian may transfer custody, alter or destroy records upon service of a suit.<sup>76</sup>

## **II. ARREST RECORDS**

Missouri statutes treat arrest records differently than other records of a public governmental body. While most public records are presumed open unless specifically closed by the governmental body,<sup>77</sup> police records are deemed by statute to be open or closed, depending on their classification.<sup>78</sup> The pertinent Missouri statutes generally classify these records as pertaining to incidents, investigations and arrests, and all law enforcement agencies of the state are charged with maintaining such records.<sup>79</sup> No custodian may transfer custody, alter or destroy records upon service of suit.<sup>80</sup>

### **1. STATUTORY CLASSIFICATIONS**

#### **A. Incident Reports**

An incident report is a record consisting of the date, time, location, victim identification, and immediate facts and circumstances surrounding the initial report of a crime or incident, including reported

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<sup>76</sup> Section 610.027 R.S.Mo. 2004 Amendments.

<sup>77</sup> See Section 610.011.

<sup>78</sup> See Section 610.100 through 610.200.

<sup>79</sup> Section 610.100.2.

<sup>80</sup> Section 610.027 R.S.Mo. 2004 Amendments.

crimes, accidents and complaints.<sup>81</sup> All incident reports are open records.<sup>82</sup>

#### B. Arrest Reports

An arrest report is a record of arrest and of any detention or confinement incident thereto. An "arrest" is the actual restraint of a person for a criminal violation that results in the issuance of a summons or the person being booked.<sup>83</sup> All arrest reports are open records, but if an arrest does not lead to a charge within 30 days, the arrest report is then deemed closed (except for specified internal uses, see §II.4, below).<sup>84</sup>

#### C. Investigative Reports

An investigative report is a record, other than an arrest or incident report, inquiring into a crime or a suspected crime.<sup>85</sup> Investigative reports are closed until an investigation becomes inactive.<sup>86</sup> An investigation becomes inactive generally when no further action is to be taken by the law enforcement agency.<sup>87</sup>

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<sup>81</sup> Section 610.100.1(4).

<sup>82</sup> Section 610.100.2.

<sup>83</sup> Section 610.100.1(1, 2).

<sup>84</sup> Section 610.100.2.

<sup>85</sup> Section 610.100.1(5). An autopsy report has been held to be an investigative report under this section. See News-Press and Gazette Co. v. Cathcart, 974 S.W.2d 576 (Mo. App. 1998).

<sup>86</sup> Section 610.100.2.

#### D. Other Records

Missouri statutes also identify two additional categories of records in the context of public access. These are emergency 911 calls and law enforcement daily logs. Emergency 911 calls are generally closed, except to the extent they might qualify as an incident reports.<sup>88</sup> Law enforcement daily logs, which are records that list suspected crimes, accidents and complaints, are generally open records.<sup>89</sup>

### **2. EXCEPTIONS TO OPEN POLICE RECORDS**

If a person is arrested and not charged within 30 days the arrest record is considered closed, except the disposition portion is available to a variety of enforcement, administrative and social agencies.<sup>90</sup> See Section II.4, below. Similarly, if a person is arrested and charged but the case is nolle prossed, dismissed, or the person is found not guilty or receives a suspended imposition of sentence, the record is then closed, except for the availability of the disposition to the various agencies.<sup>91</sup> See Section II.4, below.

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<sup>87</sup> Section 610.100.1(3).

<sup>88</sup> Section 610.150.

<sup>89</sup> Section 610.200.1.

<sup>90</sup> Section 610.100.2.

<sup>91</sup> Section 610.105.

If injuries are involved, the facts and descriptions of which are reported in an accident or incident report, then a law enforcement agency may not release such a report to anyone other than an "interested party" for the first sixty days following the incident. The term "interested party" includes the news media, the person(s) involved, the owner of an involved vehicle, and a attorney, insurance company, physician or a family member related to the involved person(s).<sup>92</sup>

Open records, other than arrest reports, must also be redacted if the record includes information that is reasonably likely to (a) "pose a clear and present danger to the safety of any victim, witness, undercover officer or other person," (b) jeopardize a criminal investigation or identify a confidential source or a suspect not in custody, or (c) compromise law enforcement techniques, procedures or guidelines.<sup>93</sup> Victims of sexual offenses may request confidentiality until a charge relating to the incident is filed.<sup>94</sup>

### **3. EXCEPTIONS TO CLOSED RECORDS**

A person involved in an incident or an accident, or the person's attorney or insurer, may obtain a complete copy of any closed record

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<sup>92</sup> Section 610.200.2.

<sup>93</sup> Section 610.100.3.

<sup>94</sup> Section 610.100.7.

for purposes of a civil claim or defense.<sup>95</sup> A copy of the record must be provided within 30 days of the request, or the law enforcement agency must seek a court order prohibiting disclosure on the basis that the safety of the victim, witness or other individual could not be reasonably ensured or that an investigation would be jeopardized.<sup>96</sup>

#### **4. RETENTION AND USE OF CLOSED RECORDS**

Closed records are not to be destroyed but are to be inaccessible to the public. They are to be physically removed from records available to the public and kept in confidential files. If a public record contains closed information, then they shall be retyped or rewritten, or if necessary redacted, to prevent public access. Closed records remain available to various agencies for purposes such as law enforcement, prosecution, sentencing and parole considerations, and employment in the child care, nursing home or criminal justice areas.<sup>97</sup>

Missouri law provides that a person may not be convicted of perjury, or of giving a false statement, by failing to acknowledge an arrest or trial when the pertinent records have been closed.<sup>98</sup> This immunity, however, pertains only to criminal prosecutions, and it does

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<sup>95</sup> Section 610.100.4.

<sup>96</sup> Section 610.100.4.

<sup>97</sup> Section 610.120.

<sup>98</sup> Section 610.110.

not sanction an applicant's untruthful responses on a license application.<sup>99</sup> Moreover, closed arrest records may not be used for impeachment purposes to establish an untruthful response on an application, but an arresting officer can testify from personal knowledge, independent of the closed records, as to facts relevant to the applicant's response.<sup>100</sup>

Note also that Missouri law allows a person to petition for the expungement of his arrest records, provided the court finds that (a) there was no probable cause at the time of the expungement petition to believe the individual committed an offense, (b) the arrest did not and will not result in the pursuit of charges, (c) the individual has no prior convictions, (d) the individual did not receive a suspended imposition of sentence related to any charge related to the arrest, and (e) there is no pending related civil action.<sup>101</sup> Expunged records are to be destroyed, if feasible, or otherwise redacted. Expunged electronic records are to be deleted.<sup>102</sup>

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<sup>99</sup> See Spradling v. Supervisor of Liquor Control, 824 S.W.2d 906 (Mo. banc 1992).

<sup>100</sup> See Thurman v. Franklin, 810 S.W.2d 694 (Mo. App. 1991).

<sup>101</sup> Section 610.122.

<sup>102</sup> Section 610.124.

## **5. DISCLOSURE OBLIGATIONS AND ENFORCEMENT**

### **A. Open Records**

The "arrest records" statutes do not include any provision establishing a mandatory response time for the disclosure of "open records," nor do they define the term or otherwise describe the obligations of a law enforcement agency. Presumably the statutory references to "open records" are intended to be commensurate with public records subject to disclosure under Section 610.023 of the Sunshine Law. As such a law enforcement agency would be required to produce "open records" within three business days as provided in that statute, and the agency can require payment of a reasonable fee for the records produced.

### **B. Closed Records**

Section 610.100.4, on the other hand, requires production of closed records to certain persons involved in an "incident" within thirty days of the request, unless the law enforcement agency is concerned about revealing sensitive information. If the agency believes disclosure might compromise either the safety of an involved person or the success of a criminal investigation, the agency may bring suit within the thirty day period to assure closure.<sup>103</sup>

### **C. Enforcement**

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<sup>103</sup> Section 610.100.4.

The "arrest records" statutes also do not include any separate provision addressing enforcement remedies available to the public. The pertinent enforcement section of the Sunshine Law, Section 610.027, applies exclusively to the Open Meetings and Records Act. However, two "arrest records" statutes include enforcement clauses.

Section 610.100.5 provides that any person may bring an action to authorize the disclosure of information contained in a closed investigative report. In determining whether all or a portion of the record should be released, the court must consider whether the benefits of disclosure outweigh the public harm, such as the identification of involved persons or the ability of the law enforcement agency to investigate or prosecute criminal activity. The court may require the party seeking disclosure to bear the costs and attorney's fees of both parties, but if the law enforcement agency was "substantially unjustified" in denying access to the information, the court may assess costs and fees against the agency.<sup>104</sup>

A person may also bring an action to require a law enforcement agency to open incident and arrest reports unlawfully closed by the agency. Under the 2004 amendments, if the court finds a "knowing" violation, the guilty officer or agency shall be subject to a maximum civil penalty of \$1,000.00 and "may" be required to pay all costs and

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attorney's fees,<sup>105</sup> and a \$5,000.00 civil penalty and "shall" be required to pay attorney's fees for purposeful violations. Again the Court may consider the factors discussed above.<sup>106</sup>

#### **IV. CONCLUSION**

The Sunshine Law was originally passed in 1973. Since that time it has been amended at least fifteen times by the Missouri General Assembly. There are over fifty appellate court cases construing the Sunshine Law. There are over thirty Attorney Generals' opinions on the Sunshine Law.

During the 2004 session, the Missouri legislature adopted many significant amendments to the Sunshine Law.

With the seemingly annual amendments to the Sunshine Law and new cases being decided by the appellate courts, it is imperative that "public governmental entities" have designated personnel who are trained and knowledgeable in responding to the issues involving the Missouri Sunshine Law.

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<sup>104</sup> Section 610.100.5.

<sup>105</sup> Section 610.100.6.

<sup>106</sup> Section 610.100(6) R.S.Mo. 2004 Amendments.